

**FROM
RAJ TO SWARAJ**



Dr. Dharendra Nath Sen

By the Same Author :

Whither India ?

The Problem of Minorities.

Revolution by Consent ?

The Paradox of Freedom.

Bharater Naya Rastra.

FROM RAJ TO SWARAJ

By

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PREFACE

It has been my experience during the last two decades or more as a University teacher no less than as a newspaper editor that far too often political theory and political practice are in conflict. At any rate, one does not always conform to the other. This curious, if rather interesting and instructive, phenomenon is observed in this country and outside, in learned dissertations by scholars and thinkers and in the news and views of periodical journals. The result is that we have a double standard of values. We have, that is, practitioners of the cult of organised coercion, who solemnly talk about Christian forbearance and Gandhian *ahimsa*; petty tyrants clothed in brief little authority, who glibly preach democratic ideals; beneficiaries of monopoly capital and unearned profits, who loudly profess faith in social freedoms and Welfare States. Thus a sort of what I call double-entry book-keeping is encouraged and maintained in the body politic.

They have, for instance, in Britain a Cabinet unknown to the law except for incidental statutory references since 1937, but very much alive and kicking in Whitehall and Westminster; a gracious Protestant Christian Majesty, the doughty Defender of the Faith, who reigns and does not rule but presides over a secular Commonwealth and Empire; a free, popular press which, of course, is free in the exercise of private ownership but which nevertheless is not amenable to popular control. We in this country have managed to talk the Briton out of his meddling in our internal affairs while retaining the dubious technique of his partnership ledger-keeping. To replenish our national credit balance we have also drawn liberally upon the sacred political *scriptures* of the *western democracies*, ancient and modern, although we proclaim from the housetops our adherence to the ends and purposes of what Gandhiji was pleased to call *Ram Rajya*. In our romantic adventures we plan for plenty and progress while listening intently to the monotonous music of the spinning wheel. I need not multiply instances.

The fact is that society is in conflict with itself, that our

dharma tends to create a gulf between precept and practice. The productive relations and the ideological superstructure based thereon stand in the way of the full and unfettered operation of the forces of production. All this explains why our life is much more vivid and responsive than our political or social literature, yes, much more vivid and responsive if only because amid hunger and squalor and misery it pursues its battle for light and liberation unceasingly. Wise men in the splendid isolation of the "ivory tower" remind us of ancient saws bereft of modern instances; weary men, on the contrary, by their toil and tears, give us modern instances and, in the process, expose the profound emptiness of the ancient saws. The former evolve theory for theory's sake, whereas the latter build it upon the hard, bitter and variegated experiences of life.

The book presented in these pages is an attempt to focuss public attention not only on the ancient saws but also on their inconsistency with, if not repugnancy to, the grim, sombre realities. It is an attempt further to examine why those contradictions between life and literature occur and how theories come to be propounded without reference to the facts and circumstances of organised social life. I have ventured, in my own humble way, to offer criticisms on what are regarded as classical theories on the State, its origin, sovereignty, independence, federalism and Parliamentary government set against its Presidential counterpart. The rule of law as interpreted by some well-known English authors and judges; the idea or concept of Fundamental Rights as incorporated in certain written constitutions; the role of the judiciary as an instrument of adjudication on disputes between the State and the individuals, between the individuals *inter se* or between the different organs of the State; the expanding invasion of the judicial forum by persons or bodies other than regular courts of law; the constitutional conventions as distinguished from the positive rules—these and similar other questions have been exhaustively dealt with against the background of new social phenomena and the crisis of our time.

The book contains a comparative study of the political

norms that have emerged from age to age and from country to country, and of the governmental structures which rest on those norms in different countries, including India, Britain, the USA and the USSR. A critical historical perspective is maintained throughout. Naturally, the Indian political system is discussed in greater detail than any other system. I have tried, as far as possible, to discard the orthodox method of treatment adopted generally by the text-book writers, Indian and foreign, and the familiar patterns of social or political postulates. Abstruse metaphysical speculations, it has been shown, are no better than idealistic chatter devoid of material content, or else they are illusions created, nursed and fostered by minds that can hardly adjust them-selves to the fast moving scenes of the crowded but fascinating drama of life. In either case, these speculations are a kind of stately retreat from the shocks of the external world, a search for comfort and contentment in the invisible or the unknown. For a time, maybe short or long, these not only sustain the ruling power but serve to influence the psychology of the masses as well. But they are eventually exploded by the dynamics of history.

The book offers a new approach to certain problems which have confronted mankind since the beginning of history and which, in their evergrowing ramifications and complexities, constitute today a challenge to civilisation otherwise described as the art of life. Civilisation is at once the product of the conflict of interests and classes and an urgent call for fresh endeavours in the harnessing of the inexhaustible resources of a bounteous nature to the wider and more intensive use of man. A thinker, as has been so aptly said by a distinguished Soviet writer, is not a "photographic plate" which records only the present. To put it in a different way, he is not a photographer, who clicks his camera and imprints on the sensitised film the image of an American Senator engaged in anti-Communist witch-hunting; a devout Indian hermit in meditation on the imponderables of this mysterious universe; or a British statesman gallantly defending the pedlars of the dollar democracy. A real thinker does not merely contemplate passively the phenomena that meet his eyes and register

mechanically anything that occurs. His is an active, creative and sympathetic attitude towards the world around him, to the inner essence of the phenomena, and to the aspirations and urges, the passions and impulses of the broad masses of humanity.

Without truth, however, there can be no useful, far less, great literature, social, political or other. And truth is fidelity to life, to the life's experiences and struggles. Man reacts to his environment and is, to a large extent, fashioned by it physically, intellectually and emotionally. Nor is environment a static or constant quantity; it yields, in its turn, to man's warm and lively contact. It follows that it is far more difficult to write books of enduring value in a society in a continuous state of flux like that in our generation than in an atmosphere, say, of the leisurely gradeur which marked the nineteenth century western social order. Moreover it is a commonplace of recorded history that institutions, beliefs and theories tend to lag behind actual practice. That, however, is no reason why an alert and receptive mind should live in the past and enunciate theories which have no relation to social reality.

The title of the book seems to require elucidation. It does not simply mean the history of gradual evolution of British rule in this country culminating in the transfer of power in 1947 to the Indian National Congress and the All-India Muslim League in the two sectors of divided India, although there is reference to that history throughout the body of the text. It does not merely tell the story of the transition of the organised political power within a given territory from the hands of a hereditary monarch to a popularly elected Board replaceable by a democratic vote, although this aspect of social evolution is not ignored or disregarded. It seeks to convey a wider and more comprehensive idea of different patterns of political or social behaviour created or produced from epoch to epoch by the dynamics of the mode of production and of the theories that emerge therefrom. Theories are examined against the background of history. They are tested with reference to the social categories which are unfolded by what I call the dialectical imperative. *Raj*, I contend, does not necessarily

mean the British monarchy or, for that matter, any monarchy at all. It includes a type of social organisation which has come to be known as State. *Swaraj*, again, is no synonym for political independence. It implies those phases of social evolution in which the people themselves come to shape, manage and control their own affairs, and may include communism.

I do not pretend to claim that this book is an adequate work, but I should consider my labours amply rewarded if it would succeed in exciting in the minds of the public generally and of the student community in particular a critical but sympathetic interest in the problems I have commended to their earnest consideration.

Among those to whom thanks are due for the assistance and help they have ungrudgingly given me in the preparation of this work mention must specially be made of Sri Basuda Chakravarti, M. A.; Professor Sushil K. Sen, M. A., of City College; Sri Saroj K. Dutt, M.A.; Sri Monomohan Mukherjee, B.A.; Sri Narayan Ghosh, B.A.; and the conductors and workers of the Jnanodaya Press.

Calcutta, Senate House, }
April 21, 1954

Dhirendranath Sen

FOREWORD

From Raj to Swaraj was not Dr. Dhirendranath Sen's first publication. Prior to it he had written three other important books — *Whither India*, *The Problem of Minorities* and *Revolution By Consent*, published respectively in 1929, 1940 and 1947, each testifying to the freshness of his thought and its distinctiveness as well. Yet *From Raj to Swaraj* was regarded as his *magnum opus*. For it was in this work that Sen's frame of mind fully came out. It showed that Dhirendranath Sen was the kind of political thinker who refused to go by the trend, current in political science of his time, to remain appallingly indifferent to the contradiction between theory and practice and to confine the theories to a make-believe world of myths and illusions. Naturally he employed his ideas to continue ceaselessly his search for truth with an unflinching fidelity to life's concrete experiences and struggles. This finally took him to a brave new world theoretically articulated by Marxist assumptions.

Against this backdrop, in his *From Raj to Swaraj*, Dr. Dhirendranath Sen, for the first time in India, presented a Marxist political science none among his contemporaries in India, subjected as they were to the tutelage of western liberal principles, could ever imagine, let alone try it. Hence Sen's book was not just a theoretical exercise of the conventional type, it was, by any measure, a pioneering work. Again, *From Raj to Swaraj* was not only born out of the author's growing agony at the persistent antagonism between theory and practice, but it also illustrated how to make a reconciliation between the two. Thus in the theoretical analysis to be found in the earlier part of the book Sen, armed with his Marxist conviction, constantly related theories to social realities, attacking the abstract political theories of the West. Even the analytical format of the book was a good example of how to bridge theory with practice. For in the book the author not only discussed the theory of the state, but also cast his searching eye on the Indian state with all its organs in practice. Hence, whatever be the way of our looking at *From Raj to Swaraj*, it verily remains Sen's *magnum opus*.

I write this foreword indeed with a sense of pride and satisfaction. *From Raj to Swaraj* was first published in 1954. But once it went out of print, for reasons unknown, it was not reprinted in the last fifty years. At last we at Calcutta University decided to bring out an unabridged reprint of the book and as a result the book is now coming out with an Introduction by its editor. As Vice-Chancellor of the University I naturally feel proud for by this we are now able to redeem a part of the debt of our nation to this great

scholar of our country. It is also a matter of satisfaction for us because for a long time since 1929 Dr. Sen was associated with Calcutta University where he eventually held the chair of Surendranath Banerjee Professor of Political Science. By bringing out the reprint of the book we get the opportunity of paying our tribute to one of the outstanding teachers of our University.

The proposal for the reprinting of *From Raj to Swaraj* by Calcutta University was initiated by Dr. Dhirendranath Sen Birth Centenary Celebration Committee, especially by its President, the Late Professor Hirendranath Mukherjee. We are grateful to the Committee. However, we feel sad that Professor Mukherjee is no more with us to see his proposal duly implemented. A special word of thanks to Sri Jahar Sen, Sri Ranjit Chakrabarty and other members of the Centenary Committee who gave us assistance at every stage of the publication of the book. Thanks are also due to Sri Pradip Kumar Ghosh, Superintendent, Calcutta University Press and his colleagues for their untiring efforts in bringing out the book in the shortest possible time. We also thank Vidyodaya Library, the publishers of the first edition of the book, for conceding their publishing rights to Calcutta University on the occasion of the birth centenary of Dr. Sen.

With the emergence of a unipolar world after the collapse of socialism in the Soviet Union and other countries and with globalisation striding fast, Indian political science appears to be in a fix, uncertain about whither to go. At this traumatic state, I hope it will get plenty of directions from Dhirendranath Sen's *From Raj to Swaraj*.

September, 2005

Asis Kumar Banerjee
Vice-Chancellor
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EDITOR'S INTRODUCTION

From Raj to Swaraj was written during 1953–54 and published in June, 1954. It was a time witnessing significant changes both in India and the world. The scenario at home was, of course, having historic changes. India had lately emerged as a sovereign democratic republic subject to a constitution supposedly made and given to themselves by the people of India. Further, India's first democratic general elections had just been held, that hugely legitimised the authority of rulers already in governance and enjoyed as well the voluntary participation by the Indian communists who initially regarded Indian independence as a mere hoax, seemingly loathed the bourgeois institutions of the Indian Republic and even stigmatised the Nehru government as a fascist rule. Thus in Indian politics a lull had just set in, causing euphoria and optimism all around. The opposition, including the communists, of course, were continuing their political rituals of protest and dissent. But that was too weak to make any dent on the generally placid and contented climate of opinion which obviously discouraged critical mood and attitude of any substantive measure. Naturally, the tenor of contemporary political thinking was that of acquiescence or resignation. A burning sense of loyalty to the values underlying the new-born political system rendered irrelevant the need of a search for any alternative.

The world outside, however, had by that time already met with an alternative. For, alongside the liberal democracy in the West, an alternative form of state and society, governed by the Marxist ideology, was by then consolidating in the Soviet Union, and China too was moving in the same direction. This naturally threw a challenge to the credibility of the capitalist model of liberal democracy of the West. Further, the phenomenal rise of the Soviet Union as a super power posed a serious threat to the US hegemony over the world. In the face of this, an unnerved USA launched a bitter cold war with the Soviet Union, spared no pains to vindicate the

* All citations are from *From Raj to Swaraj*, 1st Edition, 1954, Vidyodaya Library, Calcutta.

capitalist ideology and continued its relentless move to ostracise China from the United Nations. Yet socialism was left unscathed and the Marxist ideology wrested for itself the recognition of being an important force. What was more encouraging for it was that, notwithstanding the continuous onslaught from the capitalist bloc, the solidarity in the communist camp was still intact as, with the twentieth Congress of the CPSU to take place a few years after, the ideological war between the Soviet Union and China was yet to break out.

Strangely in contemporary Indian political science there was hardly any reaction to these cross-currents of world politics. Tutored for long in the western liberal tradition, Indian political scientists at that time almost deified the liberal doctrine, regarding it as an intellectual heresy to look for any flaws and failures of the latter. Like a "self-complacent frog in a well" (p. 105) they refused to go beyond the confines of their liberal faith, taking every liberal premise as true and valid. Naturally, they failed to detect any gap between the promises of the liberal principle and the actual performance of the liberal political system, or, for that matter, between theory and the facts of life. Accordingly, they kept on contemplating on theories having no relation to social reality and indulged, indeed, in wild illusions.

This was the historical setting in which Dhirendranath Sen wrote his *From Raj to Swaraj*. He wrote the book not just to enrich the Indian literature on political science which was, no doubt, too meagre in his time. It was actually written with a purpose oriented mainly by his personal anguishes. As a teacher of political science he was much distressed to notice a contradiction between life and literature, that is, an inconsistency between political theory and political practice both in India and the western world. This led him to write the book in order to account for this contradiction as also to resolve it by offering a kind of political theory and political analysis well in harmony with the concrete experiences of life. That he did not intend it to be just another variety of abstract theoretical formulation is made abundantly clear in the *Preface* to his book where he cautions his readers that "abstruse metaphysical speculations are no better than idealistic chatter devoid of material content, or else they are

illusions created, nursed and fostered by minds that can hardly adjust themselves to the fast moving scenes of the crowded but fascinating drama of life. In either case, these speculations are a kind of stately retreat from the shocks of the external world, a search for comfort and contentment in the invisible or the unknown" (p.vii). Temporarily, he concedes, they may have an enthralling effect. "But they are eventually exploded by the dynamics of history" (p. vii).

Although the author thus makes the strongest plea for relating theory to the facts of life, he, however, does not yield to the so-called empirical approach getting fashionable among the American political scientists in his time. To him, the role of a thinker is much greater than that of a mere photographer. As he says : "a real thinker does not merely contemplate passively the phenomena that meet his eyes and register mechanically anything that occurs. His is an active, creative and sympathetic attitude towards the world around him, to the inner essence of the phenomena, and to the aspirations and urges, the passions and impulses of the broad masses of humanity" (p.vii). The statement may well serve as a key to understanding Sen's frame of mind as a political thinker. To him theoretical exercise is not for the personal embellishment of a theoretician nor is it meant to be an indifferent routine account of what is happening around. It is actually a prompt and sympathetic response to mass aspirations, inspiring a ceaseless effort to reconstruct realities in keeping with these aspirations. Thus political science must have a social purpose to which a political scientist ought to have a firm commitment. In other words, political science cannot afford to be value-free. This stand, while viewed against the backdrop of trends in contemporary Indian political science, no doubt, makes Sen the first Indian political scientist to have abjured outright the value-free political science which, thanks to the growing campaign by the Chicago school, was already a dominant trend in American political science in his time (the timing of the publication of David Easton's celebrated work *The Political System*, incidentally, almost coincided with that of the publication of Sen's *From Raj to Swaraj*.)

This adverse attitude towards value-free political science

was further reinforced by Sen's philosophy of life. All his life he took it as a mission to know truth, to search and bravely fight for it. Hence whatever he wrote and preached was premeated by his firm conviction that the ultimate goal of a social and political thinker was to find out truth and nothing but truth. As he said in his *Preface* to the present work : "Without truth, however, there can be no useful, far less, great literature, social, political or other" (p. viii). But truth, to him, is no abstract category after the Platonic or Hegelian stereotype nor is it a dispassionate account of observed and observable phenomena, representing the latest trend in American political science of his time. "It is", as he believes, "fidelity to life, to the life's experiences and struggles" (*ibid.*). What he felt to be the appropriate method to determine and measure this truth is also indicated in the *Preface* where he informs his readers that in his book "theories are examined against the background of history. They are tested with reference to the social categories which are unfolded by what I call the dialectical imperative" (p. ix). Here, of course, there is no mention of Marx. But to any discerning reader it should be amply clear that Marx's dialectics and historical materialism together furnish the method of his enquiry.

The author's Marxist moorings are also manifest in the explanation he offers on the title of the book. A book with the title *From Raj to Swaraj* published only four years after India had become a sovereign state was likely to generate the impression that its objective was to provide an account of India's transition from the British Raj to a sovereign democratic state. But the author's intention is otherwise. Lest his readers should not be misled by the apparent meaning of his title, at the very start, he states with no ambiguity that by Raj he means the state as commonly known and by Swaraj the phases of social development in which people gradually attain the ability to shape, manage and control their own affairs which, on the Marxist criterion, represents the state of affairs in the stage of communism. Thus even the title of the book smacks of a Marxist confidence in the historical inevitability of a transition from a so-called coercive state to a classless and stateless society managed and regulated by itself.

II

The book is divided into fourteen chapters, each comprising further several sections. Thematically viewed, however, it is broadly divided into two parts. In the first part the author presents his theory of the state that dwells at length on the origin, nature, purpose and functions of the state, the nature of its laws, the nature and form of its government, and also gives a view of its citizens and their rights. In the second part the author subjects to his searching enquiry the Indian Constitution and the political system it had brought into being just four years before he wrote the book.

The first part, however, reflects more manifestly his Marxist conviction. Here his analysis is based primarily on a distinction between what he calls the 'idea of the state' and 'concept of the state'. The idea of the state, according to him, is just "an idea divorced from the concrete physical existence of an organised political community occupying a particular portion of the earth's surface" (p.14). In it the state is viewed as an eternal category lying far above life and history. The concept of the state, on the contrary, "is based on perception, experience and knowledge gathered from contact with reality" (p. 13). As Sen regards truth as integrally related to the concrete experiences of life he naturally adjudges the idea of the state—which he rightly attributes to most of the western theories—as of no meaning and significance and unequivocally expresses his preference for the concept of the state.

His chief object in the first part of the book is to elaborate this concept of the state with the aid of Marx's historical materialism. Thus he opts for a class theory of the origin of the state by viewing the state as "the product of society in a particular phase of its development" (p. 5), while analysing the nature of the state comes straight to the conclusion that "the state represents the supreme power of the dominant class of the community" (p. 26) and, after exposing the futility of the theoretical attempts by Garner and other political scientists—held in high esteem among the Indian political scientists of his time—in sublimating the ends or functions of the state, arrives at the judgment that "the ends or purposes of the state are determined by the dominant class which, in reality, constitutes it, and its functions are accordingly defined

and pursued" (p. 214). Similarly, he views law as nothing but a reflection of productive relations and, accordingly, detects that "behind law and the imposing juridical superstructure there is the organised coercive apparatus of the dominant class, which is employed, through the armed forces and courts and tribunals, to protect and sustain such social orders and such social relationships as promote the interests of that class or are acceptable to it" (p. 17). In the same vein, he defines government as "the instrument through which the will of what, for the time being, is the dominant class is expressed, formulated and enforced" (p. 27), discards the practice of attempting an institutional classification of governments much in use in his time, and offers a completely new classification of governments based on the variation of the productive mode. Again, he does not share the optimism of his contemporary Indian and western scholars that in modern democracies citizens and their rights are quite safe. He does not believe that it is possible for a democratic state to grant equally rights to its citizens as he detects in it "the division of citizens into privileged and non-privileged classes" (p. 43). His scepticism in this regard is, no doubt, rooted in his Marxist conviction that "citizenship just confers a status, and that is all. Rights and obligations depend on the class character of the state, and on its social and economic norm" (p. 47). Sen is equally critical about the claim of western democracies to have ensured freedom of the individual. According to him, in a liberal democracy freedom, of course, is granted to the individual, but subject to the condition that it does not at all impair the interest and power of the dominant class. Thus, while individuals are formally free, "they are not entitled to attack the source of power and authority of the state" (p. 136). No wonder, Dicey's Rule of Law, the historic attempt to demonstrate the merit of liberal democracy, was just a myth for Sen as he held the opinion that "the sanction of all law is ultimately the necessity of the dominant class, which, in initial stages of conflict, is sought to be sustained by ideological chatter, and, in acute crisis, is backed up by force" (p. 162).

Dhirendranath Sen's political theory embodied in a part of his *From Raj to Swaraj*, no doubt, marked a breakthrough for Indian political science of his time. For, in the early fifties

of the last century when Sen wrote his book, barring a few exceptions, none of the Indian political scientists seemed to have any flair for or interest in theoretical formulations. Scholars like A. Appadorai and D. N. Banerjee, of course, set exceptions by occasionally trying their hands at some theoretical issues. Yet they were no political theorist as neither of them developed any theory of the state that traditionally occupies the centre stage of political theory. Viewed in this perspective, among the Indian political scientists of his time, Sen was, of course, a pioneer. By his political theory he made another unique contribution as well. In Indian political science in the early fifties Marxism was viewed as an anathema. Indian political scientists then with their facile fidelity to the liberal ideology suffered so much from political conservatism and insularism that they virtually dreaded communism and were even afraid to invoke the name of Marx. It was, indeed, an unwholesome intellectual environment discouraging any move to add newer dimensions to Indian political science which, as a result, was forced to stagnate. Sen brought in a wind of change in this sordid state. With his political theory based on Marxist premises the unilinearity of Indian political science ended as it, for the first time, met with an alternative route.

Sen's Marxism, however, is confined only to the ideas of Marx, Engels, Lenin, Stalin and Mao. That is, throughout his political theory classical Marxism alone remains his frame of reference. Those conversant with the newer forms of Marxism coming up in the second half of the last century and generally designated as modern Marxism may interpret Sen's inability to go beyond classical Marxism as an instance of his limitation. However, if it was really any gap, it was actually destined by his time for which surely he was not personally responsible. For outside the communist world Marxism started receiving newer orientations only in the sixties and seventies of the 20th century and it was not until the seventies that literature on them was available in India. In view of this time-constraint Sen naturally had no other choice than to rely only on classical Marxism for constructing his political theory. Again, throughout the book, let alone in its theoretical part, Sen frequently refers to the Soviet Union about which he is quite loud in his praises. To any discerning

reader who has carefully watched the vicissitudes in the history of the Soviet Union ending finally in its fall, this uncritical attitude may seem rather odd and not worth a political thinker who is after truth and objectivity. But here also Sen ought to be viewed in his time-frame. He wrote the book at a time when the Stalinist Soviet Union yet to face invectives from Nikita Khrushchev at the 20th Party Congress was basking in its glories and inspiring communists all over the world as an impeccable socialist model. Judged in this perspective, Sen's optimism about the triumph of socialism in the Soviet Union does not at all seem unwarranted.

III

After dwelling on the state in theory Sen proposes to examine the state actually at work. Accordingly, the second part of his book is devoted to a critical evaluation of the Indian Constitution and the various organs of government working under its governance. As in the first part, here too Marxism is his main yardstick. However, at places, it may be noticed that his Marxism is punctuated by his expertise in constitutional law and government derived from his long experience as a teacher in constitutional law at Calcutta University. This, of course, was no compromise on his Marxist position, nor was any invitation to the legal and institutional approach. Actually, to arrive at a more convincing truth, he occasionally supplemented his Marxist arguments by his general critical observations based on his vast knowledge of constitution and government. However, throughout, he remained firm in his conviction that "the mechanism by which one type of social values is guaranteed and other types are checked or suppressed under duress is the constitution. Its character is determined by the character of the dominant class which seeks positive action and imposes negative restraint" (p. 21).

As a prelude to his study of the constitution and the political system of India, Sen first gives a historical account of the British rule in India, the national movement and the negotiating process in the penultimate stage that finally led to transfer of power. As regards the British rule, he, of course, like others, does not deny that under it a feudal and fragmented India was made a united India with a centralised administration.

However, unlike many others, he refuses to attribute it to the honest intention of the British masters or to their extraordinary power to work wonders. On his reckoning "the fact is that the need for markets and capitalist expansion, by its own law of motion, eliminated the remnants of a corrupt, crumbling feudal order, and led to political unification and legal and administrative uniformity on the basis of new social relations" (p. 218). Again, he contests the opinion shared by many that the imperialist design of divide and rule that sharpened the religious differences in India was the only cause behind partition of the country to take place at last. He, on the contrary, attributes it also to the utter failure of the nationalist leaders to meet ably the challenge thrown by the divide and rule. He argues that, as an imperialist power would take to any measure for its own consolidation, there was hardly any surprise in the British policy of divide and rule. But "what is amazing is that nothing practically was done on the Indian side to expose their motives and intentions, and to wean the Hindu and Muslim masses away from a dangerous, disruptive and mischievous course" (p. 222). According to him, the real issue was not any hiatus in the relations between Hindus and Muslims, but a sharp antagonism between the haves and have-nots, with the former, for their own interest, deliberately exploiting the religious susceptibilities of the common folk. And, had the Congress on the basis of a clear understanding of the issue at stake launched a fierce and persistent social movement to encounter it, then surely, the author feels, despite the desperate campaigning by the British rulers, the divide and rule would have lost its edge and partition probably could have been avoided. Sen further points out that an opportunity, after all, came to Congress to take measures at the institutional level to narrow the social gaps when it came to power in several provinces in 1937. "They had an ample opportunity to rally Hindu and Muslim peasants by drastic land reforms. They refused to utilise that opportunity" (p. 224).

Again, as regards the transfer of power, Sen is not inclined to take it as a glorious victory for Indian nationalism, or, for that matter, for the Congress. On his estimation, the policy outlined in the June, 1947 declaration by the British government, which was accepted without reservations by the Congress, and

which a little later was given a statutory form in the Indian Independence Act, virtually signified the British imperialist triumph, as it fully furnished what the imperialists wanted to have. For instance, it ensured for India territorial divisions on a religious basis, incarnating a policy the British government had consistently followed since 1905. Secondly, it embodied guarantees for the protection of the interests of the Indian princes, the services and also of British industry, trade and commerce. To Sen "this was a triumph of Churchill's policy announced on more than one occasion since 1940" (p. 228). Thirdly, it left the door open for India to continue the British connections. "Here, again, it was Churchill's policy as laid down in the Cripps scheme of 1942" (p. 239). Fourthly, the Constituent Assembly intended to be the architect of the political future of India bore no sign of a revolutionary body reflective of an oppressed people's decisive victory against an oppressive imperialist power. For it denied to the masses any role in its making and, indeed, had no popular sanction behind it, being only a make-shift arrangement made and sanctioned by the British government on the basis of restricted franchise. So, in Sen's view, it "marked no departure from British policy pursued in the case of the older Dominions, or from the Churchillian category, or even from Irwin's bombast which the Congress had repudiated at Lahore in 1929-30" (p. 239). On the basis of these observations Sen finally arrives at the conclusion that transfer of power signified no victory of the Indian people as, with no concern for the national unity of India, it forced territorial division on the basis of religion and thus completely disregarded the wishes of the people.

As the constitutional edifice of the Indian political system was built by a Constituent Assembly which, as the author has shown, was a mere creature of the British statute, he naturally has no illusions about it. Yet he takes pains to point out some of its gross anomalies and limitations. One such anomaly he finds in the expression 'sovereign republic' as the Preamble to the Constitution uses to characterise the Indian state. In his opinion, so long as India continues to be a member of the Commonwealth of Nations, accepting it as a 'free association' with the Queen as its symbolic head, and so long as there is no competent legislation, as in Burma or in the

Republic of Ireland, clearly stating that India no longer forms part of the Queen's dominions and that the Queen has absolutely no *locus standi* in the Indian political system, the expression used in the Preamble, although followed by a proclamation issued by a presidential order dated 26th January, 1950 declaring India as a republic, legally at least does not establish India as a republic, inactivating the exercise of British crown's prerogative powers operative in British India and conferring upon the Indian state a right to make war against Britain or any other Commonwealth country. Indeed, Sen has serious doubts whether India may even be regarded a truly independent state. According to him, "for complete freedom, she must enact that she is not part of the Queen's dominions and cut off her connection, symbolic or other, with the Queen" (p. 287).

The author equally has no ecstasy about the fundamental rights enumerated in Part III of the Indian Constitution, as he believes that when in a society the privileged few exclusively owns the right to private property in land and in the means of production "the formal democratic synthesis amounts.....to exploitation of the majority by the minority under the protection of laws, but in the disguise of civil freedoms and fundamental rights" (p. 74). Yet he makes some critical observations on some of the fundamental rights, which as evidences of his deep legal insight and power of logical reasoning, indeed, merit serious attention. Thus, without subscribing to the view commonly held, he dismisses any resemblance between equality before the law ensured by Article 14 and Dicey's Rule of Law. According to him, in view of the immunity granted to President, Governors, etc., in this regard by Article 361, the privileges granted to the rulers of the princely states under Article 362, special protection accorded to judges, magistrates and other public servants under Section 197 of the Criminal Procedure Code and to the rulers of former Indian States under Section 197A of it, Indian equality before the law falls far too short of Dicey's Rule of Law. Further, as regards the freedom of speech and expression guaranteed by Article 19 (1)(a), his point is that, as it is subjected to too many reasonable restrictions, very little of it is actually left for an Indian citizen to enjoy. Further, according to Sen, inclusion of incitement to an offence as a ground for restricting this freedom, when

read with the relevant provisions of Indian punitive laws that mark many an act as an offence, usurps much of what is given by Article 19(1)(a). Similarly, the right to life and personal liberty as conferred by Article 21 seems to him just a show-piece, empty of substance. For the term 'law', as used in Article 21, does not mean principles of natural justice, but only a law enacted by a competent legislature and the clearest purport of Article 21 is that, by just following meticulously the procedure laid down by this law, the state may make havoc of the personal liberty of the individual and also of his right to life.

Sen also does not share the euphoria of Ambedkar and others about the highest value and importance of Article 32 that grants a fundamental right to Indian citizens to seek enforceability of their other fundamental rights from the Supreme Court. He, of course, does not deny the utility of judicial remedies for violation of a citizen's fundamental rights. But he does not agree that a constitutional mechanism to secure judicial remedies, by itself, may generate among the powers that be a true respect for the rights of the individual. For, according to him, "rights and their application to concrete cases are determined, controlled and regulated by apparently imperceptible factors, such as the pressure of public consciousness set against the organised resistance of the possessing or owning class and of their agents in seats of authority" (p. 112). He is sceptical about Article 32 also on the ground that, to take advantage of this Article, one has to go through a complex, costly and time-consuming litigation process and this is what, he thinks, makes "the so-called constitutional guarantees ... neither fundamental nor rights, as far as the common folk are concerned" (p. 115).

This, no doubt, applies to Article 226 as well, which empowers High Courts also to issue writs for the enforcement of fundamental rights. While discussing Article 226 vis-s-vis Article 32 Sen, incidentally, raises a legal point which, left unsettled in his time, later on came up in several cases to the Supreme Court as an important issue for settlement. Actually the question that pesters him is whether, after a writ petition is rejected by the High Court, it is possible to make a fresh petition to the Supreme Court under Article 32, without availing of the opportunity to go to the latter on appeal or on special

leave. Sen's answer to the question is in the affirmative. His argument in support of this stand is that the right of enforcement is a fundamental right only under Article 32 and not also under Article 226 and, further, Article 226(2) clearly lays down that the power conferred on the High Court by Article 226 shall not be in derogation of the power the Supreme Court enjoys under Article 32. So his conclusion is that even after a writ petition is dismissed by the High Court one has every right, not prohibited by any law of the Constitution, to move a fresh writ petition under Article 32 to the Supreme Court.

Sen's study of Indian government begins with a critical account of the Indian federal system. However, his evaluation of Indian federation is preceded by a long theoretical discussion on federalism with due reference to the noted authorities on the federal form of government like Dicey and Wheare and also to the alternative model of federalism at work in the socialist Soviet Union. This theoretical analysis constitutes a very important part of *From Raj to Swaraj*. For it proves that Sen was not only a political theorist of eminence but also an able analyst of government, armed with a formidable skill to delve on the niceties of government and a profound knowledge about various governments of the world. As he views the Indian Constitution as a mere British copy-book text, it is no surprise for him to discover that the Indian federal system does not differ to any material extent from the British Indian political structure introduced by the Government of India Act, 1935. Again, after discussing in detail the centralist biases of the Indian federation, he takes it as only a natural outcome of the social character of the Indian political system and hence does not try to defend it, following the line of Wheare and others who have tried to account for the centralising tendencies of federations all over the world in terms of some newly emerging social and political phenomena. According to him, a true federation hardly thrives within the framework of a capitalist society. The form of federation, of course, is beautifully maintained lest it should antagonise the public opinion, but behind the form the contrary forces generated by capitalism are very much at work. So it is futile to distinguish, after the western political scientists, a true federation like the USA from a quasi-federation like

India. Actually, "the crisis of capitalism brought about by competition in the capitalist market, the division of the world's market into the capitalist sector and the socialist sector, the national upsurge in the colonial countries and the conflict between labour and capital in the capitalist countries themselves accelerate the transformation of federal unions in form into unitary states in substance" (pp. 317-18).

After an evaluative account of the Indian federal system, Sen attempts at an "examination of the hard core of the administrative apparatus introduced since 1950" (p. 343). Here his focus is on the Indian cabinet government with its offices of President and Governor, the position of these heads of government vis-a-vis the Council of Ministers and recruitment and role of the civil service in India. After giving the details of the mode of election of the President he criticises it on two grounds. Firstly, according to him, it is a clear deviation from the democratic principle that the indirect election of the President by the elected members of Parliament and the elected members of State Legislative Assemblies straightaway denies to the people any active role in the election of the President. The author's second point is that as the method of election of the Indian President is borrowed from the constitution of Ireland, the Constitution, probably on Irish analogy, describes it as 'proportional representation by means of the single transferable vote' which is employed as well in the election of members of Rajya Sabha and State Legislative Council. But this method of election presupposes a multi-member constituency. So, although its naming is perfectly valid in case of elections of these two legislative bodies, it does not make any sense in case of election of the President. Hence with a critical tone Sen remarks that the Constitution should have described the method of election of the President as 'proportional representation by the alternative vote' and not as 'proportional representation by means of the single transferable vote'.

As regards the constitutional position of the President vis-a-vis the Council of Ministers, Sen correctly points out that the provision under Article 74 that "there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions" (this

original version of Article 74 prior to the changes effected in it by the 42nd Amendment Act, 1976 and 44th Amendment Act, 1978 was what was available to Sen) "does not carry with it the implication in law that he is, in all circumstances, bound by the advice of his Ministers" (p. 374) even though the Constitution has not granted him any discretionary power. Article 163(1), however, gives this discretionary power to the Governor and Article 163(2) allows him freedom to determine the extent of this discretionary power. The author agrees that Article 163, read with the 6th Schedule of the Constitution, apparently implies that the Governor is required to act in discretion only in circumstances as specified in the 6th Schedule. He also refers to a Calcutta High Court judgment giving the ruling that Governor cannot act except in accordance with the advice of his Ministers. However, he points out that while the Government of India Act, 1935 clearly demarcated the areas where the Governor could act in discretion, the phrasing in Article 163 is loose and clumsy leaving enough room for confusion. Further, Article 163 bars justiciability of the question whether the Governor should have acted in discretion. Above all, the constitutional arrangement is such that the Governor is clearly an agent of the Centre. Hence the author apprehends that, taking advantage of the vagueness and non-justiciability of his discretionary powers, a Governor may very well "ignore the Ministers and go ahead with the blessings, support and sanction of the Union Government" (p. 379).

On the position of Ministers the author, incidentally, raises a legal point which still today may be regarded as of ample relevance. Although Ministers in actual practice exercise all the executive functions, legally they are not a part of the executive government nor do they have any executive functions. All executive powers are vested in the President or the Governor, as the case may be. There is, indeed "an obvious lacuna in the Constitution in that nowhere is it specifically stated that Ministers have executive functions" (p. 391). This is just a reproduction of the Government of India Act, 1935 and hence the author regards it "as another instance of slavish adherence to the form and content of a constitutional document designed deliberately to suit imperialist rule and colonial economy" (*ibid*).

As regards safeguards granted to civil servants by Article

311 of the Constitution, Sen finds little reason to feel jubilant as the provisos to Article 311 permit the appropriate authority to deny such safeguards in the interest of the security of the state or when the latter is satisfied that for some reason, to be recorded in writing, it is not reasonably practicable to grant such safeguards. Indeed, in the author's opinion, Article 311 of the Constitution is a virtual continuation of the Section 240 of the Government of India Act, 1935. The author is equally sceptical about the neutrality of civil servants, much advertised in liberal democracies like Britain and India. He admits that civil servants do not actively participate in political activities and that they serve any party in power with equal loyalty and devotion. To that extent they are, no doubt, politically neutral. Yet, according to him, they are led by a politics of resistance to a drastic change in the relations of production. Thus "when the conflict is between the possessing class and the dispossessed, between the exploiter and the exploited, between capital and labour, the active sympathy and support of the higher services is on the side of the 'haves'" (p. 421). Thus civil servants, of course, indulge in politics. It is, however, a "politics of resistance, yes, of resistance to a drastic change in the relations of production" (p. 423).

Since in Sen's view Indian legislative system is just a replica of the Anglo-Saxon system, he perhaps deems it futile to evaluate it on the Marxist criterion and, accordingly, provides only a detailed, informative account of it. One, of course, learns from his account that making the President or the Governor a part of the Union or State legislature is a sheer anachronism symbolising the English monarchical tradition and hence it ill suits the Indian Republic. One also learns that he is no ardent advocate of bicameralism. However, his dissenting judgment on these issues is based purely on legal and institutional approach with hardly any trace of Marxism. Naturally, it is the weakest part of his book. Included also in this part are his observations on the special provisions for the scheduled castes, scheduled tribes and Anglo-Indians, delimitation of constituencies and the emergency provisions as well. However, in all these what is missing is his critical judgment. What is further surprising is that he gives only a brief narrative of the emergency provisions without focussing

the dangers inherent in them, especially in Article 356 that later on enabled the Centre to use it as a pretext to dislodge frequently the elected State governments. It may, however, be said that when Sen was writing the book he had before himself only two instances of invocation of Article 356—one in Punjab in 1951 and the other in Pepsu in 1953—and none of these indicated any gross misuse of Article 356, which, in fact, took place for the first time through the Kerala episode of 1956, that is, two years after *From Raj to Swaraj* had been published.

In his analysis of the Indian judiciary, however, the author is back again to his Marxist form. Here he provides an elaborate account of the powers and functions of the Supreme Court, the High Courts and the subordinate courts with due references, for the sake of comparison, to the British, American, Swiss and the Soviet judicial systems. Naturally the formal and legal aspects of the matter receive most of his attention. But he makes it plain at the same time that he has little faith in the justice dispensed by these courts as he goes by his Marxist conviction that the judiciary is just one of the organs of the state, determined by the character and interests of the class which the state is intended to serve. In his own words, “the judiciary is not ... above the class that is the State; and to suppose that the judges hold the scales even in conflicts between the ruling class and the ruled, between the State and the individual citizens or even between the individual citizens *inter se* is no more than an illusion” (p. 481).

The last chapter of the book is devoted to an analysis of the process of constitutional amendment. Here, on the basis of a thorough examination of Article 368, Sen rightly comes to the conclusion that the Indian Constitution has elements of both flexibility and rigidity. However, according to him, it is not wise to over-emphasise whatever rigidities characterise our Constitution. For life is in a continuous flux and a constitution, to work meaningfully, must be able to respond to these changes. Indeed, “a constitution becomes a mere piece of parchment paper if it fails to take account of these hard realities of a complex life” (p. 544). Further, in his opinion, the merit of a constitution is not judged by its flexibility or rigidity. For a constitution, whether rigid or flexible, may very well go against the interests of the masses, if it is in the hands of an exploiting

class while it may serve as a very powerful instrument of social progress, no matter whether it is rigid or flexible, provided it is under the control of toiling masses. Hence the author concludes that "the test of a constitution does not lie in its rigidity or flexibility; it lies in the nature, character and magnitude of the achievement it records and in the policy and programme it envisages and, what is more important, in the source of its authority and sanction" (p. 544).

IV

It was a voice independent India had never heard before, until the publication of *From Raj to Swaraj*. But it was, unfortunately, a voice in the wilderness as it was joined by none of Sen's contemporary Indian political scientists. Actually when Sen was building with care his critique of India's Constitution and the political system, the second edition of D. Basu's *Commentary on the Constitution of India* was in circulation, which at that time was accepted by the Indian political scientists as the only authoritative study of the Indian Constitution. D. Basu's work was, no doubt, a pioneering work. But as it fully subscribed to the philosophy and assumptions underlying the Indian constitutional system and as it took the Indian Constitution just as a legal document, it attempted at an interpretation of the Constitution strictly from a legal point of view, avoiding any thorough critical appraisal.

Dhirendranath Sen, of course, did not altogether ignore the legal issues. In fact, his penetrating analysis of some of the legal issues brought to limelight many crucial questions some of which still continue portending dangers and difficulties as apprehended by Sen while some others were later on taken up by government itself for correction and a few more have subsequently been settled by the judiciary not always in the manner he prescribed. True, in all this analysis Sen employed mainly legal arguments. However, on occasions, his legalism was essentially inspired by his strong nationalist antipathy to British imperialism. This is why he could not really welcome the transfer of power based on partition as it meant to him just an abject surrender to the imperialist design. For similar reasons he could not bear with India's continuation as a member of the Commonwealth and, indeed, was so sensitive about

it that the arguments he employed on that score were not always invincible and, at least, some of them have been proved wrong by later historical development. For example, in the absence of a clear-cut law as enacted in Ireland and Burma, he refused to regard India in association with the Commonwealth as a sovereign republic strictly from the legal point of view even though a presidential proclamation was duly made on 26th January, 1950, declaring India as a republic with all its implications. Here, undoubtedly, his undaunted anti-imperialist attitude somewhat prejudiced his legal understanding. Otherwise, he should have realised that in the Indian context a presidential proclamation is as good as a law. Again, his argument that India, as a member of the Commonwealth, cannot go to war with another Commonwealth country was clearly falsified by the Indo-Pak war in the sixties and seventies of the last century. Further, the horrors he depicted about the Commonwealth also, over the years, have been belied. Indeed, there is no historical evidence that India ever had to compromise her sovereignty for her membership of the Commonwealth which, in any case, has now turned into a free club of nations with no strings for its members.

When, however, he treads only on the legal plane, that is, when he does not allow his legalism to be mixed with his nationalist susceptibilities, his legal arguments, no doubt, are at their best, with some among them raising very serious questions to be of much concern even today. For instance, when he questions the legal expediency of making the President and the Governor a part respectively of the Union and the State legislature or when he observes that ministers cannot legally be regarded as representing the government, it may sound odd, but, on closer examination, it appears that he has, indeed, a point difficult to contest. To make the President or the Governor a part of the legislature clearly amounts to making an inroad into the autonomy and sovereignty of the legislature which is traditionally regarded as a distinguishing mark of parliamentary democracy. There is a common argument among many observers of Indian Constitution that making the executive head a part of the legislature is, indeed, required in order to enable him to give assent to the bills duly passed by the legislature. However, the truth is that government alone is

entitled to execute the laws enacted by the legislature and hence a law, before it is executed, needs a kind of certification from the government, which is actually given by the President or the Governor as the head of government in the form of assent, True, the President and the Governor are empowered to summon and prorogue the houses of the legislature and to dissolve its lower house. Further, the President is authorised to convene the joint session of the Union legislature. But these are ceremonial powers the President or the Governor as a ceremonial head may very well exercise without being a part of the legislature. Hence Sen's view that the Indian constitutional rule in this regard is only an emulation of the British tradition of glorifying the 'Queen-in-Parliament' merits serious consideration Sen is equally right in his understanding of the legal position of the ministers. The Indian Constitution expressly vests all executive powers of the Union and the State respectively in the President and the Governor and nowhere in the Constitution there is any mention of the executive powers and functions of the ministers. They are supposed only to aid and advise the head of government. Hence to call them the government clearly involves a legal anomaly – an anomaly continuing even after fifty years since the publication of *From Raj to Swaraj*.

Sen's legal objection against the vagueness of Article 74, determining the relation between the President and the Council of Ministers, was, of course, not unwarranted. Indeed, the original wording of Article 74 failed to establish legally that the President is bound to act as advised by the Council of Ministers. Sen's legal argument in support of his objection, however, had its triumph twentytwo years after the publication of his book when the 42nd Amendment Act, 1976 added a revised version of Article 74 that stated with no ambiguity that the President must act in accordance with the advice of Council of Ministers. It should also be noted that Sen's apprehensions about the danger immanent in the undefined discretionary powers of the Governor with his unlimited liberty to determine the extent of such powers were fully substantiated in the years following by the numerous instances of invocation of Article 356 on the basis of a report given in his discretion by the Governor serving actually as an agent of the Centre. The worst precedent in this respect was set in November,

1967 when the Governor of West Bengal exercised his discretionary power to dismiss an elected government.

Although Sen's legal position on the constitutional issues was thus mostly vindicated by later events, on one issue, however, the logic of his legalism is found to have suffered a setback. On the joint jurisdiction of Supreme Court and High Court with regard to the issue of writs Sen takes the position that, after one's writ petition for the enforcement of a fundamental right has been dismissed by the High Court, there still remains the right to move a fresh writ petition to the Supreme Court under Article 32. But the Supreme court itself has found this position unacceptable. It has consistently held that where a petition for writs, except the writ of *habeas corpus*, under Article 226 has been dismissed by a High Court on merits, the principle of *res judicata* bars a subsequent petition for a writ to the Supreme Court under Article 32.

But, if the Supreme Court on this issue has contradicted Sen's position, on a different issue it may be said to have respected his views as well by interpreting a constitutional provision in a way he surely would have liked. Ever since its judgment in *A. K. Gopalan V. State of Madras, 1950*, the Supreme Court for nearly three decades persistently refused to go beyond the literal meaning of Article 21. That is, it held that a law was not unconstitutional just because it lacked natural justice or 'due process'. It further held that so long as a restricting law was there and so long as the procedure laid down by that law was duly followed, the right to life and personal liberty as granted by Article 21 was liable to restriction which was beyond challenge. In the light of this interpretation, as available in his time, Sen felt the right given by Article 21 was only a mockery as, by taking advantage of law abstracted from the principle of natural justice, the state might straightaway hijack a person's fundamental right to life and liberty. However, in *Maneka Gandhi v. Union of India, 1978*, the Supreme Court granted what was implicitly demanded by Sen long ago. It extended the meaning of 'procedure established by law' by virtually incorporating within Article 21 the American 'due process of law' and thus held that the court had every right to determine the reasonableness and fairness of a law intended to restrict the right granted

by Article 21. Reading this judgment against the backdrop of Sen's observations on Article 21 one cannot help feeling that the *Maneka Gandhi* verdict was indirectly a tribute to Dhirendranath Sen.

In all this one should find enough evidence of Sen's originality characterising his legal study of the Indian Constitution and government. With a searching eye reinforced by his legal insight, he was able to identify some basic lacunae of the Indian constitutional system that eluded the notice of the Indian political scientists of his time. Judged from this angle, Sen's study of the Indian Constitution and government was, no doubt, a pioneering effort. It was a pioneering venture also for the reason that in it Sen provided as well an alternative understanding of the Indian Constitution not tried in any of the studies by his contemporaries. Starting with the hypothesis that the character of a constitution is determined by the character of the dominant class, he uses the Indian system as a case study to test it. And he shows in the process that fundamental rights suffer from serious limitations as in concrete terms they mean very little to the common folk, the centripetal tendencies of the Indian federation, as in all other modern federations, are actually rooted in the crisis of capitalism, the neutrality of civil servants in a liberal democratic system like India is a myth as they are always opposed to a drastic change in production relations and the so-called text-book dichotomy between a rigid and a flexible constitution has hardly any bearing on the basic problem of encouraging the dynamism of a constitution.

V

Thus it appears that both in his theory of the state as well as in his study of government Sen was a pioneer in Indian political science and as among his several works *From Raj to Swaraj* was the only one where these two were neatly intertwined, it was, no doubt, his *magnum opus*. As at the time of its publication Indian political science, still under the western tutelage, was groping for its identity, it, indeed, had a historical necessity. However, even today, that is, half a century after, that necessity has not abated to any extent. For, although Indian political science, over the years, has

undergone a process of significant development, incorporating within itself many a progressive and radical idea, it has yet to attain an autonomous identity. In all our study and research of political science, no matter whether we are liberal or Marxist, we yet expectantly wait for directions to come through the western window and helplessly watch the gap between theory and practice without ever trying to relate our theoretical exercises to the concrete problems of real life. In this sombre state of Indian political science we may have plenty of inspiration and direction from Sen's *From Raj to Swaraj*. Thus the book has immense relevance even today.

True, among us today there is a growing community of Marxist political scientists. But to them Marxism is more a pedantry, at least so it seems to others, as they do not care to determine or are just ignorant of the need to determine what social purpose their Marxist theoretical exercises would ultimately serve. Dhirendranath Sen, on the contrary, was a political scientist already armed with a social commitment. Naturally, the conflict between theory and practice as he watched around was much too distressing for him. Hence his interest in theory was not for just theory's sake. He actually wanted to build up a theory on the basis of hard, bitter and variegated experiences of life and that is why he took to Marxism. But perhaps there was another reason as well. While watching the oppression and exploitation of man over man in human history and also in the contemporary world he was convinced that "the early man was in danger from his physical environment but safe within the group. The modern man, on the other hand, is threatened more by his neighbour than by nature" (p. 2). To guard man against this threat was his main concern which, indeed, led him to Marxism. Thus Sen's Marxism is not devoid of humanism. On the contrary, it is rooted in that and that really is Sen's *tour de force* as a Marxist political scientist. How Dhirendranath Sen makes a judicious intermixture of his humanism and Marxism may be best known from his *From Raj to Swaraj* and this is why the book calls for reading it again and again even today.

CONTENTS

Preface

CHAPTER I

Page

The State : Its Origin and Development

1. From Cave to Cottage	...	1
2. Primitive Society yielding place to the State		3
3. Theories about the origin of the State	...	5
4. The theories examined	...	7
5. Marx on Social or Psychological Factors		10
6. The State as Idea or concept	...	11
7. The Source and Meaning of Law	...	15
8. Different Aspects of Law	...	17
9. The Social Content of Law	...	19
10. Democracy's Safety-valve		22
11. Constituent Elements of the State		24
12. The State and the Government		26
13. How and when New States Emerge	...	28
14. Where the Indian State differs from the Indian Government	...	31
15. Classification of States or Governments	...	34
16. Theories About USSR		35
17. The Soviet State's Functions	...	38
18. The 'Withering Away' of State and Communism		40

CHAPTER II

Citizens and Aliens

1. From Privilege to Right	42
2. Tests of Eligibility for Citizenship	46
3. Dual Citizenship	49
4. Indian Law of Citizenship	52
5. Naturalisation as Basis of Citizenship ...	55
6. Confusion between Domicile and Residence	57
7. Nationals, Aliens and British Subjects ...	59
8. Commonwealth Citizens as British Subjects	62

CHAPTER III

Fundamental Rights

1. The Role of Symbols in Social Evolution	67
2. The First Written Charter in America	70

3. Significant New Developments	...	73
4. Implications of American Constitutional Amendments	...	75
5. Fundamental Rights as Classified in the Indian Constitution	...	77
6. Directive Principles and Fundamental Rights		79
7. Applicability of the Guarantees	...	81
8. Martial Law and its Significance	...	82
9. 'Equality' and 'Equal Protection' Clauses		86
10. Freedom of Speech and Expression	...	94
11. The Liberty of Person and Preventive Detention		98
12. Private Property as a Fundamental Right..		102
13. The Protection Extends to All Irrespective of Nationality or Race	...	109
14. The Judicial Remedy as a Fundamental Right		110
15. Meanings of the Judicial Processes	...	115
16. Fundamental Rights in USSR	...	116
17. Rights Rest on Socialist Ownership	...	117
18. No Presumption of Antagonism between State and Individual	...	118
19. Not a Programme But a Record of Achievements ..		120
20. The Soviet Way <i>versus</i> the "Democratic" way		122

CHAPTER IV

Democracy *versus* Totalitarianism

1. Man Set against Machine	126
2. Universal Franchise in USSR	127
3. One-Party Rule in USSR	129
4. The Class Basis of Political Parties ...	130
5. Political Parties in India ...	134
6. The Basic Assumptions of "Democracies"	135
7. The Basis of One-Party Rule in USSR ...	136
8. The Character of Property in USSR ...	138
9. Freedom of Criticism Under Soviet Law..	142
10. Rule of Law and Due Process of Law ...	144
11. Three Meanings of Rule of Law	147
12. The Rule in Practice	150
13. The French <i>Droit Administratif</i> ...	153
14. Judicial, Quasi-judicial and Administrative Decisions	155

	Page
15. The Liability of the Crown and its Servants	157
16. Acts of State	159
17. New Social Categories	161

CHAPTER V

Separation of Powers

1. From Monism to Trinity	163
2. Complete Separation Contrary to Fact	166
3. The Growth of Administrative Law	168
4. Developments in India	170
5. Principles Underlying Subordinate Legislation	173
6. Administrative Justice	177
7. The Exclusion of Judicial Processes in India	178
8. Administrative Justice as a Regular Instrument of Government	181
9. Advantages Claimed for the System	184
10. Independence and Security of Judges	186
11. Security of Judges alongside Insecurity of People	188

CHAPTER VI

Ends or Functions of the State

1. Theory <i>versus</i> Practice	190
2. Distinction Between Society and State Thin in Ancient Times	194
3. The Effect of the Industrial Revolution	195
4. The Inadequacy of Old Pattern of Values	196
5. State Intervention Does Not Mean Socialism	198
6. How Functions Differ From State to State	202
7. Controversy as to Form and Content of Democracy.	204
8. Formal and Substantial Rights	206
9. No Absolute Rights in Civil Society	208
10. The State's Triple End	211
11. The State's Ends or Functions Determined by Its Class Character	213

CHAPTER VII

The Historical Background of the Indian Political System

1. A Colonial Legacy	215
2. Ever-Changing Scenes	217
3. Territorial Divisions as Political Contrivances	219

4. Religious Divisions as a New Imperialist Device ..	221
5. India's Failure to Counter British Measures ..	222
6. Congress Leadership's Role in Class Conflict	223
7. Gandhian Principles	224
8. The Muslim League's Bid for Pakistan	226
9. The Cripps Scheme	227
10. The Famous 'Quit India' Decision and Rajaji Left Behind to Sow and Reap	229
11. Sensing of Social Upheavals in Asia	230
12. The Cabinet Mission's Scheme	231
13. The Fixing of the Dateline by the Labour Government	233
14. The Congress Votes for Partition in a Scramble for 'Spoils'	235
15. The British Plan Influenced by Strategic Considerations	236
16. The British Imperialist Triumphs	238
17. The Indian Independence Act, a Deed of Compromise	239
18. The Independence Act and the Statute of Westminster Compared	241
19. The Congress 'Deal' with Princes	244
20. Kashmir and Hyderabad	247
21. The Price for 'Independent Dominion'	248

CHAPTER VIII

India As A Sovereign, Democratic Republic

1. The British Crown's Prerogatives	249
2. Responsibility for War and Peace	252
3. The Issue of Elimination of the Crown in Doubt ..	254
4. The Significance of Certain British Acts ..	256
5. Commonwealth Membership in the Context of Balfour Formula	258
6. 'British' is no Forbidden <i>Mantram</i>	260
7. The Difference between 'Independent' and 'Sovereign'	261
8. Various Methods of Control over National Sovereignty or Independence	263
9. Implications of Military Aid to Pakistan...	264

10. US Economic and Technical Aid to India	..	266
11. Different Aspects of Sovereignty	...	268
12. Principles Underlying Recognition of States	..	271
13. Development of the Concept of Sovereignty	..	272
14. The Sovereignty Vested in the Dominant Class		274
15. Theory of Sovereignty Used to Promote Class Ends	275
16. A British Act Set Up Indian Constituent Assembly	..	278
17. Sovereignty Divisible in Theory and Practice	..	279
18. The Trend Towards Centralisation and its Causes	..	282
19. A Swing in the Pendulum due to Partition of India		284
20. Reasons for Change of Front	...	285
21. Doubt as to India's Independence	...	287

CHAPTER IX

The Indian Republic as Union of States

1. From Nationalism to Religious Revivalism		288
2. Different Categories of States	...	289
3. Demarcation of Territories of States in Historical Retrospect	291
4. US Citizenship Restricted on Certain Grounds	..	293
5. The Republic of Ireland's Claim to Northern Ireland		294
6. The Status of Merged States	297
7. Formation of New States, Alteration of Boundaries and Names of Existing States etc.	299
8. The Fazl Ali Commission and its Restricted Scope	..	301
9. Whether the Indian Union is a Federal or Unitary State	305
10. Conditions Deemed Essential to Federalism		307
11. Two Distinct Lines of Federal Development		309
12. Considerations Actuating British Policy of Devolution	311
13. The Federal Principle Acknowledged by 1935 Act	..	313
14. The Effect of Capitalist Crisis on Federal Norms		317
15. The Federal Structure in USSR	...	318
16. Equality of Status for Union Republics	...	320
17. Distribution of Soviet Power in Legislation and Administration	322

18. The Soviet Concept of State Power Alien to Bourgeois Scholars 325
19. Conditions Conducive to Federalism	...	326
20. Three Leading Characteristics of Federalism		327
21. Constitutional Provisions Detracting from Federal Basis of Indian Union	...	330
22. A British Copy-Book Text	...	338
23. Nationalism in Certain Social Context as a Reactionary Force		339
24. A Deified Nation-State ?		340

CHAPTER X

Our Government at Work

1. The Executive and Other Organs	...	343
2. The Vesting of Executive Power and its Extent		344
3. The Council of Ministers with Prime Minister as Head	...	344
4. The Executive Set-up in States as Distinguished From the Union Set-up	...	345
5. The Procedure Relating to the Presidential Election	...	347
6. The Swiss or USSR Analogy not Pertinent		350
7. The US Procedure Relating to Presidential Election		352
8. Difference Between Presidential and Cabinet Types	...	354
9. Conventions of the Constitution—a Double-entry Book-keeping	...	357
10. The Basic Principles of Cabinet Government		358
11. The US System in Action	...	361
12. Coordination between Executive and Legislature in US through Committees	...	364
13. The Indian System Corresponds to the British Pattern	...	366
14. Ministers in Relation to the President or Governors and Rajpramukhs		367
15. British Conventions and their Limitations in Indian Context		369
16. The Pakistan Episode of 1953		371

17. Possible Cases of conflict Between President and Union Ministers ...	373
18. The Role of Governors or Rajpramukhs...	375
19. A High Judicial Pronouncement	376
20. Where Governors or Rajpramukhs as Union Agents	379
21. The Scope of discretionary Power	381
22. The Status of Part C States and Other Territories	382
23. The Legal Immunity of President, Governors and Rajpramukhs	383

CHAPTER XI

The Services in Administrative Mechanism

1. Are Ministers Officers? ...	385
2. Calcutta High Court Overruled by Privy Council ...	386
3. Are Ministers Executive Government? ...	388
4. The Present Position of Ministers	390
5. The Secretariat Organisation ...	391
6. The district as Unit of Administration ...	394
7. The district Magistrate and His Functions	395
8. The Subdivisional Officer and His Functions	398
9. The Police Organisation ...	399
10. Special Measures in Cases of Disturbances α Apprehended Disturbances	400
11. Guarantees to Public Servants ...	402
12. Classification of the Services	403
13. The Tenure During Pleasure	404
14. A Public Servant's Salary is only a Claim on the Crown's Bounty	405
15. The Effect of the Constitutional Change	407
16. A Civil Servant's Right to Sue for Salary	409
17. The Lacuna in the Supreme Court's Judgment	411
18. A Feudal Anachronism ...	413
19. The Judicial Immunity to Public Services	414
20. Public Service Commissions ...	415
21. The Career Service in Britain	417
22. The Services in US and the "Spoils"	419

23. Neutrality of Public Servants a Myth	421
24. Public Servants and Labour Unions	423
25. The Meaning of Industrial Dispute	426

CHAPTER XII

Parliament and State Legislatures

1. Anglo-Saxon and Other Systems	428
2. Composition of Parliament and State Legislatures	430
3. Parliamentary Practice and Procedure	433
4. Issues Involved in Money Bills ...	435
5. The Speaker's Certificate Justiciable or Not	436
6. Public and Private Bills ...	438
7. The Committee Procedure	441
8. The Law and Practice Relating to Veto	442
9. Ordinance-making Powers ...	445
10. Distribution of Legislative Powers ...	446
11. Financial Allocations ...	449
12. The Finance Commission's Recommendations	450
13. The Financial Autonomy of States Restricted	453
14. Three Kinds of Proclamations ...	454
15. Limitations on the States' Power to Tax Sales ..	455
16. The Supreme Court's Rulings on "Import-Export" Clause	457
17. Privileges of Parliament and Legislatures ..	459
18. British Law and Practice ...	460
19. Indian Legislatures' Power to Imprison and Fine in Doubt	462
20. Parliament and State Legislatures are not Courts of Record ...	465
21. Parliamentary Practice in US and USSR ..	466
22. Constituencies and Voters in India	468
23. Special Provisions for Scheduled Castes, Scheduled Tribes and Anglo-Indians ...	469
24. Delimitation of Constituencies ...	471
25. Judicial Proceedings in respect of "Elections" and "Disqualifications" ...	472
26. The Controversy about Second Chambers.	474
27. A Bicameral Legislature in Federation ...	476

CHAPTER XIII

The Judiciary

1. The Story of its Evolution	..	480
2. The Role of the US Supreme Court	..	481
3. The Law <i>versus</i> the Court	...	482
4. Judicial Review Reflects Class Conscience	..	484
5. The "Property" Conscience of Judges		485
6. From Courts to Courtiers	...	487
7. The Judiciary in Early British Rule in India	..	488
8. The Institutional Changes after the Rebellion of 1857	..	489
9. From 1937 to 1950	...	490
10. The Meaning of "Court of Record"	...	491
11. Our Supreme Court	...	493
12. Retired Judges Debarred from Practising	..	495
13. The Supreme Court's Jurisdiction	...	497
14. The Meaning of "Legal Right"	...	498
15. Different Kinds of Appeals to the Supreme Court	...	501
16. The Significance of the Supreme Court's Writ Jurisdiction	...	505
17. The Supreme Court's Reference Jurisdiction		508
18. The Composition and Functions of State High Courts		509
19. The Subordinate Judiciary	...	512
20. Meanings of the expressions ' <i>beyond jurisdiction</i> ', ' <i>illegality</i> ', ' <i>ultra vires</i> ' etc.		513
21. The Organisation of the US Judiciary		515
22. The Swiss Judicial System		517
23. The British Juridical Monism		519
24. The Peculiar Pattern of Soviet Law and Justice	520
25. A Comparative Study of the Soviet and Indian Systems		524
26. Trials by Jury	...	525
27. The Illusion about Judicial Independence and Impartiality	..	529

(XXXXVIII)

Page

CHAPTER XIV

Constitutional Amendment

1. Method and Process of Change	...	531
2. Two Categories of Constitutional Amendments		532
3. Power to Amend the Constitution Belongs to "Parliament" or to "Houses of Parliament"	..	533
4. Principles of Construction	...	535
5. The USA Procedure as to Constitutional Amendments	...	538
6. The USSR Procedure	...	539
7. The Judicial Review in USA	...	540
8. Peculiar Features of Different Systems	...	541
9. No Dualism in the Soviet Way	...	542
10. The Rigidity or Flexibility of a Constitution not its Real Test	...	543

INDEX

I-XX

CHAPTER 1

THE STATE :

ITS ORIGIN AND DEVELOPMENT

1. From Cave to Cottage

We are members of a civilized community. We owe allegiance to a new State, that is, Bharat. Why it is called a new State will soon be explained. Meanwhile, one would naturally like to know what the State is, how it comes into existence, and what part it plays in the development of human personality. The State, as we understand it today, has not come out of nothing. It is the product of centuries of man's labour. There was a time, thousands and thousands of years ago, when there was no State. Our ancestors in that dim, distant past lived in conditions of primitive simplicity. With fire they warmed themselves; in fire they sought protection. From fire and the mysterious heavens they got the inspiration of their toil. In intimate communion with the earth, the grass and the water they watched in wonderment the glow of stars. They watched gapingly the huge, wild trees, and in the glow of dawn greeted the rising sun with a happy, lazy smile. They lived in caves and rocks. By and by, they learnt how to make dwellings for themselves. These dwellings were not palaces; they were not built of bricks and mortar. Those were thatched huts. Much earlier they had passed through the pre-historic epochs of savagery and barbarism. Each of these epochs has been classified by Engels into a lower, middle and upper stage, according to the progress made in the production of the means of subsistence. Alongside this progress the

family had grown and developed without, however, revealing any definite trends so as to enable the social historians to distinguish it from savagery or barbarism.

Our ancestors hunted in bands and shared in common the spoils of the chase. From season to season they changed their dwelling places; they were nomads. They had not yet a State in the technical sense of the term. Even now there are tribes or races who live in conditions approaching primitive communism or what may be called a state of nature. It was, as it were, a sort of primitive democracy. There were yet no means by which the people were forced against their will to accept and obey a particular code of social behaviour. There was no organised public authority set up to keep the clan or tribe under its control or to regulate its conduct under pains and penalties. The early man was in danger from his physical environment but safe within the group. The modern man, on the other hand, is threatened more by his neighbour than by nature. In primitive democracy there was no law, for the desires of the tribe and the individual were the same. There was no crime because man was free from neurosis. He was free from neurosis because he was not in conflict with himself or with his tribe.

With the growth of population and the increasing demand for food, shelter and other necessities, these ancestors of ours searched for new means of production. Originally their means of production were sticks, stones and their own unsophisticated skill. With these they produced the things they required. The old gentile system or primitive democracy had not yet disappeared. But by the historical process of dialectics it had started showing symptoms of disintegration and decay. With difference in individual skills handed down from sire to son as new means of production, there emerged disparities in wealth. Thus there was an urge not only to accumulate but to perpetuate the accumulated riches. The father right or the mother right, as the case may be, and the inheritance of property by children were recognized. The inheritance gave the richer and more

resourceful family power against the gens giving rise, as it did, to the first rudiments of the nobility or the elite. The social constitution took a new turn. Conflicts now and then arose between families and families, between clans and clans, between tribes and tribes. Wars were fought savagely. Those who had been beaten were either killed or enslaved. Their means of production were taken by the victors. These new acquisitions in the shape of new means of production and of slave labour, brought about yet another great change in the social organisation of the clans. Their attitude towards life was changing. Alliances were also made between families and families and, in a wider context, between larger groups of a growing population.

Mankind then settled down as pastoral communities. Instead of killing all the beasts they had hunted, they captured them, kept them alive and domesticated them for producing food and creating wealth. Land at that time and, in the earlier stages, was deemed to belong to the clans or tribes. But in consequence of disparities in wealth among members of the tribes or clans, largely accounted for by the surplus value of labour and primitive accumulation, the idea of private ownership was diligently fostered and practised. Thus in every tribal organisation the symptoms of early class conflict revealed themselves. Where they had within the same tribe or clan a clear dividing line between rich and poor, creditors and debtors, the conflict was the sharpest. The situation became more and more complex by the addition of a mass of new population alien to the tribe or clan.

2. Primitive Society yielding place to the State

It is a mistake to think that these primitive communities had no social organisation whatever. One reads of the *basileus*, the hereditary military chieftain; and of the *agora*, the council, amongst the ancient Greeks; and of the *Agamemnon* in Homer's *Iliad*. The *basileus* of the Heroic Age, according to Aristotle, signified leadership over freemen, but it had no State power in the modern sense.

Its functions were very much restricted, It shows that the social organisation they developed was by no means a State. There was no sanction other than a general sense of good and evil, that controlled and sustained them as a clan or tribe. That sense was generated, to quote Karl Marx, by "natural necessity, qualities of the nature of man (however estranged they may seem), and interest." These bound the members of civil society to each other. First limited to prisoner, of war, slavery, in some form or other, was, however, gradually imposed upon fellow members, of the clan, the tribe and even the gens. From time to time, especially in response to the seasonal changes, systematic campaigns were organised for the purpose of capturing cattle, slaves and treasure as a regular means of gaining a livelihood. The State in our modern sense, an instrument of organised class coercion, was still missing.

Gradually, when society became more and more complex on account of the division of the clan or tribe into classes, the primitive society gave place to the State. Some of the organs of that society were transformed. Some were replaced by new organs. The entire gentile order was thus, superseded by what we call the State. The place of 'the whole adult population in arms,' operating through its gentes, phratries and tribes, was taken by an 'armed public power'. This armed public power was the sanction of the State; in fact, it was the State. The organised armed power was employed not only for offensive and defensive purposes against other clans or tribe but, whenever necessary, against the people themselves. The State thus formed protected private property against the traditions of primitive communism, sanctified the right of inheritance and encouraged and developed new forms of acquiring private property. It sanctioned the class division of society. It sought to perpetuate the newly acquired , power of the possessing and acquisitive class to exploit the non-possessing classes, and to lord it over the latter. This power was recognised as a right.

The State arose out of society, but soon it raised itself over it. Starting as an instrument for moderating the

conflict between classes, it passed into the hands of the more resourceful and organised class. Thus in a way it alienated itself from the common people and society. Coercion, and not consent, was then its main sanction. This, in brief, is the history of the origin of the State. The State is thus the product of society in a particular phase of its development. Its emergence shows that society is in conflict with itself and that force is necessary to moderate the conflict, if not to resolve it.

Some Indian and European scholars think that this theory of the origin of the State is contrary to the tradition and history of mankind, particularly to the Aryan tradition. They read into it the baneful influence of the Marxian interpretation of history which, according to them, is materialistic vulgarisation of the spiritual destiny of man. Without in any way underrating Marx's great contribution to the theory one may point out in reply to these scholars that the Aryan tradition, on which they rely, lends support to the Marxian doctrine rather than to their fantasy. Reference may be made in this connection to the interesting story that Bhishma, the famous patriarch of the Kurus, relates in graphic detail the origin of the State in answer to Yudhisthira's query (Mahabharata, Shanti Parva, Chap. 49). In the Krita (Satya) Yuga, as the story runs, there were no State and no King, no law and no law-giver, no crime and no criminal. It was an age of bliss and of peace within the *Gana*. Subsequently however, members of the *Gana* became corrupt, greedy and jealous of each other. Private property relations based on economic exploitation took the place of communal ownership and distribution, and in consequence thereof or in its wake emerged the State, the law and the law-giver.

3. Theories about the origin of the State

Some call it the theory of force. That, I contend, is not a correct interpretation of the theory. It is oversimplification of a complex problem. With the development of the forces of production a pattern of productive relations comes into existence, giving rise to different classes in

society. The class in command of the surplus value is the possessing class, who organises the coercive power and, uses it to tackle the class conflict in order that society does not break up and its interests are not prejudiced. You may call it the class theory of the origin of the State, but not the theory of force in its naked form.

There are other theories concerning the origin of the State as well; for example, the theory of divine origin, the organic theory, the social contract theory and the historical or evolutionary theory. The divine theory attributes the origin of the State to the will of God. According to the organic theory, the State is like an organism, and is a union of the external material and of the inner spirit. This is no better than pseudo-divinism applied to the material concerns of a politically organised community, just a crude biological analogy which is inept and misleading.

The contract theory postulates the existence of a state of nature prior to the origin of the State. To Hobbes, one of its greatest exponents, the state of nature was a savage state in which man was constantly at war with man and man's life was "solitary, poor, nasty, brutish, and short". It was so disgusting and repulsive that individuals entered into a compact with each other abdicating, through and in terms of this compact, their natural rights to a person or a body of persons, without power to recall such abdication or surrender. The person or the body of persons to whom this surrender was made became the sovereign authority of the community. Being no party to the compact the sovereign authority came to possess absolute and unlimited power. The people, therefore, had no right to revolt against it. This theory was used in defence of an absolute monarchy in the seventeenth century in England.

To Locke, the state of nature was one of equality and freedom. But it was not without a sense of insecurity, due in a large measure to the absence of an impartial arbitrator whose decision would be final on any question of conflict. Accordingly, individuals surrendered some natural rights in order to ensure security of life and

property. If the sovereign created by this covenant failed or refused to carry out its basic purposes, it was open to the people to rise up and overthrow the sovereign. Locke's theory was calculated to provide some sort of moral sanction for a limited, constitutional monarchy, which for centuries has been one of the most significant characteristics of the British political system.

Rousseau's state of nature was one of idyllic bliss. Peace and freedom reigned everywhere. Complications arose with the growth of population and, by a social contract, civil freedom was substituted for natural freedom. Each individual surrendered all his natural rights and powers to all, and the sovereignty that emerged was inalienable and indivisible. Civil society was formed by unanimous consent, but it did not mean that unanimity was required for any decision taken by the sovereign power. It was the general will, and not the wills of all, that was the determining factor. Both Hobbes and Rousseau regarded the sovereignty as inalienable and indivisible. But Hobbes ascribed it to the ruler while Rousseau thought that it belonged to the people. In the opinion of Locke, however, the sovereign power was limited by the right of the people to assert themselves and to depose the sovereign where there were gross violations of their rights.

According to the historical or evolutionary theory, the State is an historical product. The State has not appeared suddenly at a particular point of time. Various factors have contributed to the evolution of groups of families or clans into organised political communities described as States. By far the most important of the contributory factors have been kinship, religion and a comparatively high level of social consciousness.

4. The theories examined

Text-book writers refer to all these theories of the origin of the State and discuss, in elaborate detail, their respective merits or demerits, but on calmer reflection these may be reduced to only three, namely, the divine theory, the

contract theory and the class theory. With a shift in emphasis, the divine theory may be explained in terms of the organic theory, and in the process of rationalisation the State is identified with soul and Government with body. From the divine theory was perhaps evolved the doctrine associated with Hegel. It was an idealistic view of the State. That distinguished German philosopher called the State "the image or reality of reason". To him the State was the end, the final achievement of man, and all the purposes of human endeavour in diverse spheres were harnessed to that ultimate end. So, according to him, the State united civil life. The family and civil life were created by an actual idea, and their unification into the State was predetermined by the development of that idea. The State was the power, the symbol of a nation's will. It stood above, and distinct from, the hopes and aspirations of private life, or the needs and requirements of civil society. Hegel idealised the State, not the State as such, but the 'national' State; and such an idealised 'national' State was "the truly spiritual or intelligent element in civilization." From this philosophical idealisation of the 'national' State flowed his familiar theory, that is, that "the State is absolutely rational, the divinity which knows and wills itself, the eternal and necessary being of spirit, the march of God in the world...". Hegel, however, took a step forward, as compared with Kant, in the theory of the State, law and civil society.

According to Kant, the guiding principle of all human activity was the demand for pure reason. That principle he called the categorical imperative. Law was the external expression of the grand moral idea to which might be attributed the concept of the general will. From that has stemmed the theory of normatism, which means, in essence, that there is no connection whatsoever between the juridical norm and the material concept of social relations. It denies the conflict of social classes. Law is not dependent on an external stimulus; it is governed by the rule of autonomy, a rule which the law establishes for itself.

But Hegel posed his historical method against the metaphysical fantasy of Kant. History, in Hegel's view, showed a "continuous and orderly unfolding, a trend or direction", and each historical epoch had its own character or quality. There was, in nature, a pattern or a law of development. The evolution of society and the main phases of civilisation are to be explained in terms of this immanent law. That has come to be known as 'historical necessity', a familiar and much-quoted phrase in our time. Hegel thought that there was real necessity in historical development. There are contrary forces in history as in nature. These give it the continuity of development. The balancing of opposites is not permanent, and only points to a direction in change. After each adjustment comes a third position, more adequate than either of the contrary forces. He saw a manifest destiny in the state of affairs. Absolute truth is projected in time, and constantly moving toward a final consummation. That is Hegelian doctrine in essence.

But both Kant and Hegel were idealists in the philosophical sense. In both there was defence of absolute rulers. If, therefore, we owe to Hegel's historical method the famous Marxian dialectic, it has nevertheless been a source of inspiration to the protagonists of reactionary nationalism and fascism which find their expression, though in different forms, in the idealised national State.

The theory of contract, whosoever its author or protagonist, presupposes (i) the existence of natural rights, that is, rights existing prior to civil society; and (ii) a level of political and social consciousness which suggests organised political and social life. Whatever rights might have existed before the emergence of civil society, it is too much to presume that people had developed mentally to such an extent in that remote past that they were competent to enter into contractual relations among themselves, or with other persons, or a body of persons, and vest in the latter, conditionally or without condition, the sovereign authority. Consent is supposed to be of the essence of contract, and a contract, legally is terminable at will. Even if these people

were free to contract, which presumption on every showing is untenable, they could not, as of right and in the exercise of free choice, terminate the contract. They could not overthrow, in the traditional lawful manner, the sovereign authority which they had helped bring into existence by contract. They could liquidate the contract only if they could challenge effectively the organised coercive power of the sovereign authority and wrest power from it.

5. Marx on Social or Psychological Factors

The class theory, of course does not ignore force or the processes of social evolution as contributory factors in the emergence of the State. It does not ignore the character and quality of its change from time to time, and the transfer of the sovereignty, which in the last analysis is organised coercion, from one class to another class. The actual social relations, that is, productive relations, are not created by the State. Instead, they represent the force which creates the State and sustains it. Nor does it deny that, in given circumstances, is built a juridical and political superstructure with definite forms of social consciousness. But the real basis of this superstructure and social forms is the totality of the productive relations. If, for instance, the dominant class in these productive relations is the feudal aristocracy with the monarch as the apex, the doctrine of the divine origin of the State is fostered and propagated, and the social consciousness and the juridical and political superstructure are determined accordingly. There is deification of the monarch, and special sanctity is lent to the Court and its decrees and ordinances. A system of philosophical and political doctrines is evolved in accordance with this pattern. All this is reflected in art and literature, songs and prayers. Again, if the dominant class happens to be the bourgeoisie, the character and quality of the superstructure undergoes a transformation. Instead of the Divine Right they now speak of the General Will; in place of the Monarchy they put the Commonwealth; and by emancipating feudal serfs from the bondage of land, they turn them into slaves of factories and mines. The old juridical and political

super-structure and forms of social consciousness are replaced by a new superstructure with a new pattern of social values, as reflected in the sciences no less than in the humanities.

It has been suggested by some scholars that Karl Marx gives no importance to the social or psychological factors in the consciousness of mankind in a given epoch of social development. This kind of suggestion is vulgarisation of what is generally called Marxism. As early as 1844, Marx wrote among other things: "In the social production of their lives people enter into definite and necessary relationships which are independent of their will—production relationships, which correspond to the definite degree to which their mutual productive powers have developed. The totality of these production relationships constitutes the economic structure of society, the real basis upon which is built the juridical and political superstructure, and to which definite forms of social consciousness correspond. The means of production of material life condition the social, political and spiritual processes of life in general."

It is not the idea which gives rise to family (patriarchal or matriarchal), to totemic kinship, to society or to the State; it is the productive forces and the relations of production which lead to the growth and development of social institutions, including the State. The totality of these forces, relations and institutions creates ideas, and thus a juridical and ideological superstructure is built. The legal relations, the forms of State, or the institutional norms cannot be explained, interpreted or understood except in the context of the development of history and of its material background. The so-called universal development of the human soul, whatever it may mean, offers no satisfactory explanation of the growth and development of social institutions.

6. The State as Idea or Concept

It is rather fantastic to think that the State existed from the beginning or, to put it in a different way, that the State has neither beginning nor end. Yet some

scholars and philosophers assert that the State stands above life and history, that it is an eternal category of some sort. Many of them are learned and distinguished men, each in his own way. Why do they make such assertion ? The only plausible answer is that their minds have been influenced by a particular type of juridical and spiritual superstructure. They have not been able, in spite of themselves, to rise superior to the prejudices and inhibitions, complexes and traditions fostered and sustained by that superstructure. By their fantasies and absolute metaphysical speculations they have, in their turn, sought to strengthen and consolidate it. Nevertheless, the fact remains that in certain periods of human history there was civil society without the State. There was, for instance, family. There were gens, clans and tribes. Traces of these primordial times are found even today. Take the aboriginal tribes of the Andaman and Nicobar Islands, especially in those areas which have not yet been brought under the control of the Government of India. There was also a time when there was no exploitation of man by man. Man might have been killed by man; yes, man perhaps was a cannibal. But there was no exploitation in the sense in which we understand it today.

The first form of division into classes in organised civil life was the division into 'slave-owners' and 'slaves'; as in Greece into 'citizens' and 'subjects'; as in Rome into 'patricians' and 'plebeians'; as in ancient India into 'Aryans' and 'non-Aryans'; or, as a general pattern, into 'tribes' and 'gens', on the one hand, and 'aliens', on the other. It is significant that Plato's 'Good Life', as described in his *Republic*, did not extend to the slaves. And yet on their labours was based the economy of the Greek City-State. The division into classes became more and more complex with the development of productive forces and changes in the mode of production. The State came and developed as a machine to ensure domination of one class over another. And in the process of ensuring it, recourse has been had to various kinds of ideological cultural and juridical apparatus which, on the face of it,

are not attributed to force, but which, in the last analysis, are nonetheless based on force. Romantic tales are told about the State, its transcendental quality and its divine destiny, and people are taught by law-givers and pedagogues to show their reverence to this grand idea of the State, which is interpreted as reflecting the voice of reason or as representing the will of all the people. The concrete manifestation of this voice of reason or general will is supposed to be law.

Some philosophers distinguish this 'idea' of the State from what they call the 'concept' of the State. As a concept, the State is precisely the State that arose and fell in the past as well as the State as we find it today with its population and demarcated territory, its government and sovereignty. The concept of the State implies not one single world State, since that is contrary to experience. It implies, in fact, a multiplicity of States because that is, and has been, the experience of mankind. In this perspective States may be in conflict with each other fighting for territorial aggrandizement and economic expansion, and also on ideological grounds which ultimately resolve into material gains or losses. Thus States have their weaknesses and blemishes, their temptations and blandishments, their limitations and restraints either self-imposed or enforced by their vulnerability to attacks and challenges within or without. The first step in the process of knowledge, as Mao Tse-Tung says, is to come into contact with the things of the external world. This belongs to the stage of perception. Then comes the next step which is to synthesise the data of perception, and to re-arrange and reconstruct them. This belongs to the stage of conception, judgment, and inference. Thus concepts are constructed. The concept of the State, then, is based on perception, experience and knowledge gathered from contact with reality.

The 'idea' of the State, on the other hand, "presents a picture, in the splendour of imaginary perfection, of the State as not yet realised but to be striven for." That view was taken by Bluntschli who elsewhere refers to the State as 'organised mankind'. According to

Burgess, the idea of the State is the State perfect and complete, whereas the concept of the State is the State developing and approaching perfection. The idea of the State may be interpreted in other ways as well. It may have no reference even to the perfect State to be striven for. It may just be an idea divorced from the concrete physical existence of an organised political community occupying a particular portion of the earth's surface. This is, in a sense, a variant of the Kantian 'pure reason'. Further, the State is understood as existing in 'idea' before it has assumed a concrete form with material content, before, that is, it has developed its organs and made its laws. This is the theory of 'idea' determining 'matter' as opposed to the theory of 'matter' creating 'idea'. It presupposes the existence of 'idea' prior to 'matter'. It is the theory of supremacy of the idea over the matter. The theory means that the idea of the State somehow dawns on man, and then he proceeds, by the utilisation or manipulation of his physical and material resources, to give a concrete expression to the 'idea' by creating conditions of the actual State. Hegel, for instance, says that the 'idea' of the State has "immediate actuality in the individual State". The 'idea' of the State remains a metaphysical abstraction until by historical process it takes 'flesh and blood', and is concretised in different organs or instruments.

In these different ways the 'idea' of the State has been interpreted from time to time by philosophers as distinguished from the 'concept' of the State, which is a concrete reality. But, as Mao points out, for a person who shuts his eyes, stops his ears, and totally cuts himself off from the external world, there can be no knowledge worth counting. Knowledge starts with experience, with contact with the external world. Therefore, the 'idea' of the State is of little practical value. It may give delight to a certain school of philosophers speculating in their little world of mysticism and abstraction, but social institutions grow out of historical necessity in disregard of metaphysical speculations.

7. The Source and Meaning of Law

What, then, is law ? Different people have defined it in different ways as different people have defined the term 'State' in different ways. That law, roughly speaking, is a body of rules no body can dispute. These rules are traced by scholars to the direct divine inspiration, tradition, codes, fiction, equity and legislation. Some of these sources are handed down from generation to generation by word of mouth. The rest are embodied in commentaries, judicial or quasi-judicial decisions, statutes and appropriate administrative or executive orders.

Common law and equity have played a great part in the evolution of the Anglo-American legal system. What is 'common law' ? What is 'equity' ? How does the one stand in relation to the other ? Common law is, more or less, judge-made law, a body of rules grounded on decided cases. These rules become precedents, on which the judges and others connected with the control and management of the State rely, in applying them to new situations or to new relations of social forces. When, however, they are found to yield no results agreeable to the dominant class, they give way to equity or, in exceptional circumstances, to legislation enacted by the dominant class. Equity is a principle involving a juridical process of social readjustment. When the common law precedents are neither adequate nor effective, they are sought to be broadened by the application to given situations of judicial discretion or what they call the 'rule of reason'.

The method thus employed is supposed to secure 'substantial justice'. It is not denied that in cases, which do not involve acute social conflict or a drastic change in the recognised ethical norms, justice, even substantial justice, is sometimes done. But judges are part of the State machine. They are influenced by the lore of their profession and custom and usage as interpreted by their predecessors. They look back, and not forward. They swear by the past. By training and temperament, they are indifferent to the present, and cynical about the future.

If, however, some great judge, conscious of the forces at work and anxious to hold the scales even, ventures to go ahead, alike in his enunciation of principles of social equality and in his denunciation of grave social wrongs, he is put 'on the carpet'. Or the central power house transmits the current in such a manner that all principles of justice, equity and good sense become the sinister shadows of the night. A new 'sober' judge then takes his place, the executive resolutely acts, and the 'talking shop' of a legislature is moved to ordain and admonish !

According to some social thinkers and philosophers, law is a psychological experience. It is a reaction to emotions; it is intuitive. The source of law is psyche, sensation, emotions and ideas. The emotions and ideas, it is suggested, have no connection with external phenomena. Then there was that famous German author, Von Ihering who conceded, of course, that human interest was the basis of law. He stated that a study of the external history of legal forms and institutions, as had been attempted by Maine, gave no clear conception of law, its origin and its qualitative character. He thought that the true method was to study critically the inner chronology of legal forms and institutions, and to search for their hidden springs and ultimate roots. What these springs and roots were, he did not care to explain in understandable language. What, however, is clear from this formulation is that, guided by the interests of society as a whole, the State has given us law and placed a check on its own activity. Law, in his view, was a 'proviso,' in the nature of a guarantee for the 'vital conditions of society'. But the question remains, what are 'the vital conditions of society' ?

Law, like the State, is a reflection of productive relations, and the conflict between these relations and the forces of production. Of course, in the course of its evolution it acquires mutative forms which spring from the ideological superstructure. Law, as Vyshinsky observes, is the sum total (a) of the rules of conduct, expressing the will of the dominant class and incorporated in statutes, orders and ordinances; and (b) of custom and traditions sanctioned

or acquiesced in by the State. Behind law and the imposing juridical superstructure there is the organised coercive apparatus of the dominant class, which is employed, through the armed forces and courts and tribunals, to protect and sustain such social orders and such social relationships as promote the interests of that class or are acceptable to it. It is not law that sustains society or the State. Law rests on society, and is sanctioned by the dominant class, that is, the State. To quote Marx, law is "an expression of society's general interests and needs, as they emerge from a given material means of production." The ultimate sanction, accordingly, is the organised force of the dominant class in any particular period of human history.

8. Different Aspects of Law

Law, whatever its form or content, and crime are "rooted in the same conditions as is the governing power at the time". But crime is defined as an offence against the State. This definition does not evidently tell the whole truth. Crime is an offence against the State, all right. But, in ultimate analysis, it is the struggle of an individual or an isolated group of individuals against those social relationships which are fostered and protected by the dominant class, that is, the State, and which, in the main, are advantageous to that class. Property relations are reflected in any kind of civil or criminal law. In the most primitive phase of human history, however, the sense of property was confined to 'movables' such as cattle, other domesticated animals, timber and so on. Land, as an additional constituent of property, came to be recognised in the pastoral stage. This was partly because in the primitive stage mankind was mainly nomadic and partly because it did not occur to it that land was a factor of production. There was, in other words, no sense of scarcity in respect of land.

The dominant class determines those property relations and gives them legal forms. It is as true of civil law as it is of criminal law. It applies to constitutional law as it does in respect of ordinary law. Now, a Bose marrying

a Ghosh girl absorbs her in his *gotra*, and gives her his family surname. A son, born of this union, takes the surname of the father's family, whereas a girl married into another family adopts, in law and in fact, the surname of her husband. There is nothing oriental in this law. This is in vogue in most systems of law, eastern or western, with exceptions in the USSR, several States of Eastern Europe and the People's Republic of China. Why is it so ? To be sure, Providence has not ordained it. This custom or law gives one the sense of dominion of the *pater familias* over the wife and children.

The family grows and expands along the lines of agnatic relationship. That means that kinship is counted through males and not females. In consequence of the expansion of the family, successful wars or colonisation the idea of 'gens', 'tribe', and 'clan' springs up, and it indicates a process of development. These institutions are set up on a proprietary basis. Other changes occur out of historical necessity. The purely agnatic kinship is transformed into a composite kinship combining, as it does, both agnatic and cognatic relations. For instance, as we find in Hindu Law, the daughter of a sonless person practically takes the place of the son, and by the fiction of the *putrika* the daughter's son comes to be recognised as belonging to the family or 'gens'. One finds traces of this dominion of the *pater familias* in the institution of *dattaka*, the taking of son by adoption.

It may be argued that what has been stated above does not apply to a matriarchal family. Without going into the question as to whether the matriarchal family was earlier than the patriarchal and *vice versa*, it may be stated in reply that there is nothing in the matriarchal family which controverts my main proposition. Property relations are not completely absent from the matriarchal system either. Only in place of the *pater familias* you have the *mater familias*. Besides, in the latter phase of the matriarchal family the mother is, as a rule, under the dominion of her own brother or her mother's brother. It is true nevertheless that the idea of the proprietary basis of

the family is more developed in the patriarchal system than in the matriarchal, which incidentally, seems to suggest that the latter system is an earlier phase of social development.

Leaving aside ancient family and its origin and development, numerous instances may be cited showing that even comparatively modern law and custom is based on productive relations, and that these relations are under the coercive control of the dominant class. Take the land laws. There was a time when the tenants were no better than slaves or serfs. That was when the feudal aristocracy possessed unchallengeable power. Gradually they were emancipated from bondage, and yet they had no rights over the land they cultivated. Then with the crippling of the landed aristocracy on account of the rise of the industrial class, the tenantry began to acquire some rights, though of a restricted character. It does not mean however, that power passed from the hands of the feudal aristocracy to the impoverished peasantry. What happened was that more and more the dominance of the capitalist class came to be reflected in the laws, decrees and ordinances, affecting not only industrial undertakings but agriculture and its diverse ramifications as well.

9. The Social Content of Law

Law, like the State, is not an abstraction. Law is not merely a statute-book or a body of rules or a learned dissertation by a judge. It must have, apart from the form in which it is expressed, some social content. It determines relations between the State and individuals, or between the individuals *inter se*. It prescribes the processes by or under which those relations are to operate in the day to day life of civil society. It seeks positive action to achieve a certain social end. For the same purpose it imposes negative restraint as well. Divorced from the social forces or material relations law is unreal. It lays down and guarantees the processes in accordance with which the ownership, possession or use of all forms of property are determined.

But it may be said that the law relating to defence is not concerned with property relations, at any rate with private property rights. The answer is that it is not a correct or sound view to take of the defence law and its aim and purpose. It is true that, save in emergencies when the internal situation of a country goes outside the control of the police and other internal security personnel, the defence services are generally employed to guard its frontiers and maintain its territorial integrity. But in whose interest is this done ? In early times the idea was that the interest thus sought to be served was the interest of the 'gens', 'tribe' or 'clan'. In capitalist democracies in our time the interest is supposed to be the interest of the 'nation'. In the USSR it is the interest of the 'toiling people's dictatorship' which, according to the leaders of the Soviet State, is another name for Soviet democracy. Neither 'gens' nor 'clan', neither 'tribe' nor 'nation' means the whole people in an organised community. Nor evidently do the 'toilers' embrace all the people, so long as classes exist in a given society. In every case it is the interest of the dominant class, not necessarily the majority, that is protected by the defence forces, in times of both internal turmoil and war or external aggression. It is true, however, that in a certain phase of social development, the defence forces may have nothing to do with private property relations.

To some, again, constitutional law is basically different from ordinary law. Unlike the latter, it is argued, constitutional law is entirely free from any economic or social bias. Instead, it deals with the organisation of the State, defines its character and functions, and lays down the principles of the distribution of its supreme power among its different organs. But implicit in the definition generally given of constitutional law is the admission that like every other kind of law it is a guarantee of the procedures and processes through which the dominant social class seeks to further its own ends.

Apart from this positive aspect of the guarantee, it has the negative quality of restraints and prohibitions whereby

the other classes are prevented under pains and penalties from projecting their interests and ideals into the juridical and ideological superstructure. The mechanism by which one type of social values is guaranteed and other types are checked or suppressed under duress is the constitution. Its character is determined by the character of the dominant class which seeks positive action and imposes negative restraint.

Take Britain and the USA on the one hand, and the USSR on the other. In Britain the basic rule is that no private property can be acquired without due compensation. The USA constitution lays down that no person shall be deprived of property without due process of law and that no private property shall be taken for public use without just compensation. A more elaborate guarantee than either is provided for in our own constitution in respect of property, following the pattern of English and American law. In the USSR, by contrast, the property is socialist, either in the form of State property or in the form of co-operative and collective farm property. Besides, every household in a collective farm, in addition to its basic income from the collective farm enterprise, *has for its personal use*, a small plot of land attached to the dwelling and, *as its personal property*, a subsidiary establishment on the plot, a dwelling house, livestock, poultry and minor agricultural implements. In each case the relevant rule is part of the constitutional law. This shows that the class dominance is reflected not only in ordinary law but also in constitutional law.

No one would accuse Maitland, a well-known English scholar, of the Marxian bias or of mental distemper due to starvation. What he wrote about a special feature of the British constitution is revealing. He observed: "If we are to learn anything about the constitution, it is necessary first and foremost that we should learn a good deal about the land law. We can make no progress whatever in the history of Parliament without speaking of tenure; indeed our whole constitutional law seems at times but an appendix to the law of real property". It is no longer an appendix

only to the law of real property because during the last few decades real property as a factor of production has been relegated to a secondary role by another kind of property controlled and manipulated by the City of London. In the modern context, therefore, English constitutional law is an appendix to the law of property, and property in most cases means private property. Productive relations are the foundation of the constitutional law of every country as they are of other kinds of law.

It is, however, pointed out that it might have been a true picture of the situation when the franchise was restricted only to property-owners, or that it may be applicable to a country where a monolithic party controls the affairs of the State. Now in most civilised States, particularly in the so-called free, popular States all manner of people have access to the seats of power through the secret ballot. It is argued that had the dominant class in these democracies wanted to monopolise power to its own exclusive advantage and to the detriment of other classes they would not have, by legislation, given the right to vote to all adult citizens or allowed parties other than their own to function. Doubtless these are plausible arguments. But they ignore certain important social phenomena.

10. Democracy's Safety-valve

Up to a certain point the development of the forces of production, changes in the productive relations and the law of motion relating to social values proceed by their own momentum and independently of the will of man. That happens in the period of growth and development, in the state of adolescence. When, later on, these forces, relations and ideas reach maturity a conflict ensues between the productive forces and the relations of production, and ideas clash with ideas. This state of maturity is marked by open and consciously organised antagonism between the classes which finds expression in social upheavals. Adult franchise is, indeed, a valued political right for the common man. In certain instances this right has come by the sheer force of the social law of motion in the phase of uninterrupted

material development. There are also cases showing that this right has been wrested from unwilling hands by means of revolution.

But adult franchise without the effective and adequate means of freely exercising it, is to most people, a formalistic right. By the very nature of formal democracy the polling-booths are widely scattered over the territory of a country, and being extremely poor the overwhelming majority of the voters either avoid the booths or suffer themselves to be insinuated into a helpless attitude of least resistance. This interesting process is, as it were, the democracy's safety valve. Adult franchise and its use or misuse in these circumstances have failed almost everywhere, as they are bound to, to disturb the *status quo*, and to affect, in any substantial measure, the material foundation of the social, political and ideological fabric, that is, the State in its wide sense.

They may produce changes from time to time in the legally replaceable cadre of the higher administrative apparatus, but not in the organised coercive machine. They may, as they do at stated intervals, put an Eisenhower in place of a Truman or substitute a Churchill for an Attlee. But surely they do not and cannot have any perceptible effect, except for a time, on the law of the market and exchange, of stocks and shares, of banks and bonds. Nor are the other instruments of the coercive power such as the armed forces, the courts and the bureaucracy in any way shaken. Further, the juridical and ideological superstructure remains in tact. With such a change there may be, as apparently there is, a change in emphasis on this point of detail or that, but there is no change in what is called the way of life, in the fundamentals of positive action and of negative restraint.

This brings one to the question of legal sanction of political parties in formal democracies. The fact is that in these democracies parties are tolerated so long as they adhere to the accepted norm, to the recognized rules of the 'democratic' political game, and to a pattern of life that offers no defiant challenge to the propertied class. Do

Republicans and Democrats differ, to any material extent, as to the social values of what they call the American way of life ? Are not Conservatives, Liberals and Socialists in Britain fundamentally agreed on what passes for the western democratic approach ? The 'American way' and the 'western democratic approach', tendentious as these expressions are, imply a particular pattern of social relations, a conflict of classes, which are reflected in the State as well as in the law which the State promulgates or sanctions from time to time.

11. Constituent Elements of the State

From discussions in the preceding pages it is evident that one cannot think of a State without a people. But a people alone do not constitute a State. The State must have some territory where it may seek to solve its own problems in its own way. So a State must have a people and a territory demarcated from the rest of the world. But a people and a defined territory merely cannot make a State. Within that territory the State must evolve some kind of machinery to register its decisions and enforce its decrees. That machinery you may call Government. Thus a State must have a people, a defined territory, and a government. These three, again, cannot give you a full-fledged State. And why? Because a State must have power not only to enforce its decisions internally but to do so in freedom from outside interference. It must have power to guard and protect its own frontiers. This power you may call sovereignty. So, a State must have (i) population; (ii) territory ; (iii) government; and (iv) sovereignty. A State is thus a people, more or less numerous, politically organised in a given territory. It must be capable alike of enforcing its laws within its borders and of dealing, on equal terms, with foreign States.

This familiar definition does not, however, take into account the inner essence of the State. It does not tell you of those material conditions that bring it into being, of the process of its development from one form to another, of the role of continuous class conflict in the fashioning

of this development, and of its maturing, in and through the cycle of its life, into a new pattern of society. Correct as it is in its own way, the definition betrays a formalistic approach to a complex social phenomenon. But it Shows at the same time that at present there is not one-world State, although some thinkers seem to believe that a time may come when different peoples would sink all their differences and build one single State for mankind. Whether that day will ever come and, if at all it comes, when, is still in the realm of speculation. It may come; it may not. Or it may be, as Marx says, that with the progress of human civilisation the world would be Stateless, all the States 'withering away' in the process of social evolution, and yielding place to a new kind of society. For the present, however, there are States and States. There are small States as well as big States, backward and undeveloped States as well as progressive and prosperous States. States, big or small, progressive or backward, must have their boundaries. From time to time these boundaries may be adjusted or altered by cession, accession or conquest. Sometimes States are partitioned and new States formed.

The basic presumption as to the existence of a State is that the bulk of its inhabitants render it obedience. When that obedience is not forthcoming for some reason or other, the State begins to disintegrate. When there is disobedience on a mass, organised scale, the State collapses. Such a condition of things may immediately result in chaos, confusion and disorder, unless by some process a new State is brought into existence. From the earliest times in history such events have taken place.

Obedience to a State may be attributed to different causes or to a combination of those causes. We obey because it is in our interest to obey. We obey because failure to obey may be drastically punished. We obey because others obey and our people in the past obeyed. We obey because we cannot, as a rule, think of any alternative to obedience. We obey because we feel that it is unpatriotic to let down our own State. We obey because by habit and tradition we are suspicious of any

sudden change and are apprehensive of the unknown. All these factors or some of them provide the State with its requisite sanction.

12. The State and the Government

One may ask now, what is the difference between the State and the Government ? It would appear from the definition given above that the Government is part of a whole, which is the State. Some writers think, as was pointed out earlier, that Governments may come and Governments may go but States go on for ever. In other words, the Government is temporary, whereas the State is permanent. The Government, according to them, changes but the State is constant. The Government is the body, whereas the State is the soul, and so on.

In the case of *Poindexter v. Greenhow* (114 U.S. 270) the USA Supreme Court distinguished the State from the Government in these words: "In common speech and common apprehension they (the State and the Government) are usually regarded as identical; and as, ordinarily, the acts of the Government are the acts of the State (because within the limits of its delegation of power), the Government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The Government is an agent, and within the sphere of the agency, a perfect representative; but outside of that it is a lawless usurpation". The idea of the State as thus enunciated by the Supreme Court is another example of idealistic hallucination. It is contrary to the facts of experience. From the practical point of view it is a philosophy of reaction which deifies the State and places it above human control. It is an attempt to make the State impervious to social requirements, and invulnerable to social challenges.

There are scholars, on the other hand, who contest this view. They think that, in the continuous conflict of interests, the State represents the supreme power of the dominant class of the community. The Government,

according to them, is the instrument through which the will of what, for the time being, is the dominant class is expressed, formulated and enforced. They argue further that when one dominant class is replaced by another, the State also undergoes changes in form as well as in content. Consequently, the State's instrument, that is, the Government, too, takes a new form or shape. In their view there is no element of permanence either in the State or in the Government. They reject the traditional theory that while the Government is concrete, the State is abstract.

Unless one believes that, all of a sudden and by accident, the State dropped from the blue heavens, or that Providence in His infinite wisdom, for some mysterious divine purpose, made a king in His own image and sent him down to rule his fellow men and give them laws, one cannot resist the conclusion that the State, as I have already pointed out, is an historical social product. The State presupposes the existence of a continuous conflict of interests, sometimes open and avowed, but generally covert and imperceptible. In this conflict is reflected the repugnance of the productive relations to the forces of production in given circumstances. Conceivably, there may be cases where the internal social antagonism may be eliminated and yet the State continues to exist for reasons other than purely domestic. But these are exceptions. to the general rule.

The operation of the basic law that the relations of production must conform to the productive forces is sought to be impeded by those private interests that happen to monopolise the productive forces. They offer powerful resistance to a change in the relations of production which yield them their gains. This powerful resistance on their part is organised and operated through a coercive apparatus, which is the State. It comes in the shape of laws. and ordinances, restraints and prohibitions. preventive and punitive measures. Thus in the last resort, the legislature, the judiciary and the administration act in concert with the armed forces in defence of the *status quo*, which comes into collision with the productive forces.

13. How and When New States Emerge

So long as this organised resistance does not give way to a superior social force, the State remains in its old form, although from time to time there may be changes of Governments. As soon, however, as a new social force breaks the resistance, a new State comes into existence, representing that force. In the wake of this change comes a change in the Government, that is, a change in the State's machinery through which the new social force begins to function. Thus one class is replaced by another class, the old order yielding place to a new one. In place of the old State a new State steps in.

A graphic picture of this change is given in the *kurma Purana* (I. 29, 17-23) in connection with the rise of Buddhism and jainism challenging the supremacy of the Brahmins. The Sudras, we are told, drove the Brahmins away from their seats of power and authority and humiliated and insulted them. Some Brahmins were forced to honour the Sudras and teach them the forbidden Vedic hymns. All this happened because the State power passed into the hands of the Sudras. According to the *Puranas*, it was the *Kali Yuga* and in that age the Sudras were the ruling caste or class. The Brahmins and Kshatriyas were ousted and the class character of the State as well as of the Government changed. Support for the theory that States are not permanent, that they come and go in the cosmic order of creation and destruction like other material things or social phenomena is found in *Vishnu Purana* (II. 14, 11-20). Of course, the authors of the *Puranas* and the *Epics* did not speak in terms familiar to us for the obvious reason that the social relations, the mode of production and the environment of which they had knowledge were peculiar to those ancient times and have undergone transformation in the course of the centuries. But their observations reveal some truths which are as valuable today as they were in their time.

Not that in every case one definite, ascertainable class replaces another equally definite and ascertainable class. Sometimes there is overlapping of classes in this

struggle. Take the Russian Revolution of 1917. In the earlier phase it was, more or less, a bourgeois-democratic revolution, resulting, as it did, in the overthrow of the Czar and the feudal order. It was organised and sustained by the combined efforts of the capitalists, workers and peasants. The result was a composite State which, in the latter phase of the revolution in October-November, was, in its turn, smashed by the alliance of the working class and the peasantry, and a new State emerged. The class character of the State, more or less, crystallized. The new State came to be known as a proletarian dictatorship.

Take, again, the American Revolution of 1776. It was a case of the British State being overthrown, and of a new American State taking over, in consequence of the successful colonial revolt. Alongside this capture of power by the rebels came a change in the institutional form of the State. Essentially, however, it was not a class conflict. It was, in the main, a conflict of interests between the metropolitan capitalists and industrialists, and their colonial counterpart engaged almost in the same type of exploitation. To an extent, it was also a revolt against the monarchy and the feudal aristocracy actively associated with the British State.

Nearer home in China, a series of armed insurrections, organised and led by the Communists, culminated, after the Second World War, in the overthrow of Chiang-Kai-Shek and the landlord-ridden State. What has filled the void in the Chinese mainland is not a socialist State but a composite State representative of all progressive and democratic elements with the Communists playing the leading role.

A large number of States, including the USA, do not recognise the People's Republic of China as led by Mao Tse-Tung as a State, while several States, including India, treat her as a State. On the other hand, Chiang-Kai-Shek and the Kuomintang, driven out of the Chinese mainland and forced to take shelter in Formosa, continue to represent China as a permanent member of the UN's Security Council, to the exclusion of the People's Republic controlled by the

Chinese Communists. Without going into the impropriety of the action sponsored by the USA and certain other States in this regard, one is entitled to presume from this strange and extraordinary situation the absurdity of the doctrine that States are permanent and constant and invariable, and not subject to dissolution at any time.

If, as the USA apparently holds, Chiang and his Kuomintang constitute the Chinese State, Mao and his people are interlopers. Conversely, if, as India maintains, Mao and his people are the new Chinese State, Chiang and his supporters are bandits. If, again, neither group represents the State, China becomes, in law and in fact. Stateless, which is repugnant to any accepted doctrine of municipal or international law. In any event, what is clearly demonstrated by these developments in China or in relation to her is that, contrary to the morbid hallucinations of idealistic pedagogues and their unthinking disciples, States *qua* States have no quality of permanenc no imponderable essence of eternity.

These thinkers, scholars and text-book writers-and they are so called-do not see that they often contradict themselves. They say that India is now a State because she is free from any foreign control. What was India before she became sovereign and free? Was there then no State in India? If India was Stateless, which, of course, is, by no test or standard, a tenable proposition, then the conclusion is irresistible that there was a void, and that that void has been filled by a new State popularly known as the sovereign, democratic Republic of India. If, however, India was part of the British State functioning, as it actually did, in the interest of the British ruling class and under the sanction of its coercive apparatus—which, indeed, is the only correct appraisal of the situation existing at that time—then it follows that a new indigenous State has taken the place of an old British State. In either case, again, it is proof positive of the fact that States are not invariable and eternal, that States come and go. In each of these three cases the old State has been replaced by a new State, whatever the character of the social force backing and

sustaining it. New States thus installed have set up new Governments for the purpose of transmitting their wills and aspirations through their respective agencies such as the legislatures and executives, judiciaries and armed forces.

There are nevertheless numerous cases where Governments change hands without any change in the States at all. In the United Kingdom, as you know, the Conservatives come to power replacing the Labour Government and *vice versa*. These changes take place from time to time. In the nineteenth century and until the first decade of the twentieth it was a change of places between the Liberals and the Conservatives with occasional Coalition interludes in times of national emergency or by reason of the exigencies of the parliamentary situation. These formal constitutional adjustments imply no challenge to the fundamental character of the British State, its class composition, its institutional norm and the source of its power and authority. The State remains as ever, and it is significant that in Britain the Opposition is part of the State hierarchy, being the King's or the Queen's Government in reserve. On the other side of the Atlantic, in 1952-53 the electorate forced the Democrats to step aside, and installed the Republicans in seats of authority. It was certainly a change of Government, but not of the State, for the foundation of the American State, the coercive power of the dominant class, was not affected to any extent whatsoever. If there was any difference, it was one of degree and not of kind, of emphasis and not of the social norm. It is thus clear that among socially organised communities States may change just as Governments change. Sometimes, of course, Governments change without any perceptible effect on the States.

14. Where the Indian State differs from the Indian Government

In the last analysis every State is organised class coercion. In that sense every State is a dictatorship, whatever the formal name it may have assumed. It may be a personal dictatorship, a dictatorship of the few against the many, or a dictatorship of the many against the few.

Of course, forms of the dictatorship vary and so also do the methods and techniques through which its ends are sought to be realised. Because it reveals itself in different forms in different stages of historical development, it assumes, or is given, different names. But the dictatorship, irrespective of its forms, sets a definite pattern of social behaviour and imposes pains and penalties where it is violated or even departed from. From reprimand to execution, from fine to liquidation, there is no form of punishment which is not accessible to the ruling class. And the ruling class constitutes the dictatorship, and all that it implies.

The line of demarcation between the State and the Government seems to have been drawn on the principle that while citizens are entitled to employ persuasion or other recognised democratic devices for a change in the Government, they cannot resort to armed insurrections to subvert or destroy the supreme power of the community. Thus a community, politically organised as a whole, is supposed to be the State, as distinguished from those who, for the time being, manage and administer the affairs of a given country. These latter are the Government.

India, that is Bharat, as a Union of States with her constitution and laws, custom and traditions in their totality is our State. Our Government at the Centre for the present is Dr. Rajendra Prasad with his Council of Ministers and others who assist them. To seek to subvert or destroy India conceived as a State is, according to law, treason. To seek to overthrow Dr. Rajendra Prasad's Government by means not prohibited by our constitution is our legitimate right. In other words, the pattern of social behaviour set for an organised political community is not allowed to be disturbed. Behind that pattern stands the entire might of the ruling class. That pattern, with the sanction sustaining it, is the State. Within the pattern and subject to its norm, changes may take place with or without a change in the administrative personnel. The administrative personnel are the Government.

If you, by speech, printed word or visible representation, bring the Government of our country into public contempt

or hatred, you commit what they call sedition. Does the Government here, you may ask, mean the State ? If it does not, you will ask next, does it mean persons who, for the time being, manage and administer our affairs ? If it means the latter, you cannot evidently try to bring about a change in the personnel of the administration without committing a serious offence-an absurd proposition. Under British rule an attack on, or criticism of, the administrative personnel might have been prohibited. But times are different now. Our citizens have the right today to plead and work for a change in the Government.

If the law of sedition, as defined in the Indian Penal Code, has any meaning in the light of our present constitution, you can speak against ministers, shout at them, say that they do not deserve public confidence, and move and pass votes of censure against them. You may bring them into public contempt as well as the machinery under their control, subject, however, to the law of libel. But you cannot challenge the way of life or the social pattern implicit in the constitution, and organise, your resources and work for its overthrow by resort to force, set against the force of the ruling class. Your force is illegal or extra-legal while the force of the ruling class is legal and legitimate! It does not matter if, in fact, you happen to represent the majority. In law you are anti-social, whatever your objectives! In the conflict of forces, as history shows, sometimes the force of the ruling class triumphs. Then the rebels are ruthlessly pursued in their lair and are arrested and imprisoned or liquidated. Sometimes, again, the force of the revolution smashes the force of the ruling class. Then the old ruling class either yields to the new or is completely destroyed. At times, however, the conflict ends in cease-fire, truce and then compromise.

Sometimes 'Government' is identified with the administrative or executive part of the entire machinery. Thus it means Ministers, administrative officers and others concerned with the administration. Difference is made between the Government so understood and the legislature

and the judiciary, From this point of view, the legislature is something different from the Government, and so is the judiciary. The legislature makes laws, The executive, that is, the Government administers laws. The judiciary interprets laws. In a broad sense, however, the legislature, the executive and the judiciary are three organs of the Government. In this perspective, the 'Government' and the 'State' are frequently used as identical terms. Very often, again, the State and the Government evoke like associations in popular minds. A State bus, for instance, is a Government bus. A State railway is nothing but a Government railway. A State scholarship is a scholarship granted by the Government.

In our constitution the term 'State' has been used in different senses in different contexts. In the First Schedule it stands for Part A States, Part B States and Part C States. In Part XIV it means a State of the 'A' or 'B' category, and does not include a 'C' category State. In Part III it includes the Government and Parliament of India, the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India, In several articles and clauses, again, it has been used to mean the supreme power of the politically organised community, As is well known, the federal units of the USA and of the Commonwealth of Australia are called States not only in popular parlance but in their respective constitutions as well.

15. Classification of States or Governments

States or Governments, as understood in a wide popular sense, may be classified with reference to (a) institutional forms, or with reference to (b) the character and composition of the dominant class who wields the supreme power of the politically organised community. These are, according to institutional forms, (i) monarchical and republican; (ii) written and unwritten; (iii) rigid and flexible; (iv) federal and unitary; and (v) parliamentary and presidential or non-parliamentary.

There is, of course, overlapping in this classification. For instance, India is a republic, but she has declared and affirmed her acceptance of the British King or Queen as a symbol of the free association of the sovereign member-States of the Commonwealth and, as such, the head of the Commonwealth. Again, the British constitution is partly written, though basically unwritten. The Act of Settlement, the Petition of Right, the Reforms Acts, the Nationality Acts, the Crown Proceedings Act, to name only a few, have found place in English constitutional law.

According to the second category of classification, States or Governments are (i) feudal; (ii) bourgeois or capitalistic; (iii) bourgeois-democratic; (iv) democratic after the pattern of China and several countries of Eastern Europe; and (v) socialist. Incidentally, it should be noted that in the first and primary phase of their formation the States were mainly slave States. Here, again, the classification suffers from some overlapping. For, States, which are predominantly feudal, may have capitalistic elements. Likewise States, which are predominantly bourgeois or capitalistic, may still have the remnants of the feudal order. Again, States, which are in form democratic, may in effect be controlled by bourgeois and feudal forces. Further, socialist States may also reveal elements which are inimical, potentially or otherwise, to socialism. But one gives a State its name with reference to the dominant element in its supreme power.

16. Theories About USSR

Questions are frequently asked about the Soviet Union—questions in the nature of earnest, bonafide and inquisitive inquiries as well as questions in the shape of misleading suggestions and cynical insinuations. An attempt may be made to answer one or two typical questions. Is the USSR a socialist State? Is it moving toward communism? Or, is it a dictatorship, which is supposedly a negation of democracy? Joseph Stalin refers to the USSR constitution of 1936 as a "socialist constitution, based on the principles of fully developed socialism". There is mention in the constitution

itself the phrase 'the dictatorship of the proletariat' by way of recording the historic process of revolution (article 2). Attention may be invited in this connection to Stalin's interpretation of the phrase and of the qualitative change in the character of the proletarians. It is admitted that in 1917 the bourgeoisie was overthrown and the dictatorship of the proletariat established in its place. But no longer can the working class be called the proletariat, for the proletariat is a class bereft of the means and instruments of production under an economic system in which these belong to the capitalists and in which the latter exploit the proletariat. But in the USSR the capitalist class has been eliminated, and the means and instruments of production have been transferred to the State. And the leading force of the State is the working class itself. The USSR is also described as "a socialist State of workers and peasants" (article 1).

The Soviet State, according to Vyshynisky, is a State of the transitional period, and "on the basis of the joining of the proletarian dictatorship and proletarian democracy" it guarantees a solution of certain historic problems. Vyshynisky's description of the USSR seems out of date having regard to the qualitative transformation of the proletarians. They are no longer proletarians in the accepted sense of the term. The expression 'proletarian' may indicate, as it does, an historic process but it is just not the word for the existing Soviet State.

If the Soviet State is a 'dictatorship', it is asked, how can it be a 'democracy'? If, on the contrary, it is a 'democracy', how can it be a 'dictatorship?' The answer is this: In so far as the machinery of organised coercion remains and is used for suppressing the enemies of the socialist way of life, the USSR is a dictatorship, but it is a dictatorship of the previously exploited majority directed against their enemies. Naturally, the suppression of the exploiting minority is easier, simpler and costs far less blood than "crushing the uprisings of slaves, serfs and hired workers", by the minority. In either case, force is used and in either case, therefore, it is a dictator-

ship, whatever the different forms it may take at different times and in different places. In so far, however, as the Soviet system is based on the participation by the working population in the activities and operations of the State, on the election of all officials and their replacement by the popular Soviet vote, and on the accessibility of every toiling man or woman to the instruments of the State, it is a democracy. The State, in a general sense, is a 'special power' in the hands of the exploiting minority. The Soviet State, by contrast, is a 'universal power' of the bulk of the population, that is, the toiling workers and peasants. It is a Soviet democracy; at the same time it is a dictatorship directed against those who may not be reconciled to the Soviet way of life.

Real freedom, personal or other, which is of the essence of democracy, is possible where exploitation is abolished, where there is no unemployment and beggary, and where "man does not tremble for fear that tomorrow he will lose his work, his dwelling and his bread". The State, in any event, is a dictatorship, which is nothing but a machine whereby one class represses another. It is, of course, not denied that a bourgeois-democratic State is a more progressive social phenomenon than a feudal State. So long as the capitalist system is not broken, the working class is intensely keen on fighting for, and securing bourgeois-democratic 'freedom' and 'civil rights'. This fight is part of the continuous struggle in the process of mobilising its ranks, rallying its allies and finally overthrowing the system itself. Class repression is nevertheless the basis as much of a bourgeois State as it is of a feudal State. The Soviet State is also a machine of repression inasmuch as it is a State, but because the entire machinery and the means and instruments of production are effectively, not merely formalistically, in the hands of the vast majority of the people, it is a democracy.

This confusion as to the meanings of the words 'democracy' and 'dictatorship' is, perhaps, due to the fact that certain people are not in a mental posture to accept that class repression is the basis of every State or

that, in modern times, there can be any democracy except under a parliamentary system of the British Cabinet type or of the American Presidential type. But both these assumptions are contrary to historical experience.

17. The Soviet State's Functions

The Soviet leaders claim that the class character of society in the USSR has changed. All the exploiting classes for example, the landlord class, the capitalist class and the *kulak* class have been eliminated. The working class has ceased to be the proletarian class in the old, traditional sense, because the conditions which give rise to the proletarian class have been done away with, because there is no longer feudal or capitalist exploitation, because there is instead the socialist ownership of the means and instruments of production. If the premises of the Soviet leaders are correct, it may be asked, where is the need for class coercion. If, again, there is no class coercion why, it may be asked, does the Soviet State exist at all, regard being had to be theory that the State is organised class coercion?

To these and similar other questions both Lenin and Stalin furnished the answer. It is this : The Soviet State is confronted with certain unpleasant facts such as capitalist encirclement and certain forms of wrecking and internal sabotage. Only a strong Soviet State, which is at once democratic and dictatorial in a new sense, can smash the resistance of wreckers and saboteurs, and deal effectively with the machinations involved in capitalist encirclement. Yes, the function of military suppression inside the Union has ceased with the abolition of the exploiting classes. But there is still the function of protecting socialist property from wreckers and saboteurs, and of accelerating the transition from socialism to communism. It also continues to be one of the USSR's primary functions to defend the country from foreign attack or external aggression. Without a strong and powerful State the working class cannot consolidate its social gains and direct the movement toward communism. A new society grows and develops,

and the Soviet State fosters and protects this process of change by purging society of the feudal or bourgeois traditions and institutions, and by giving a new direction to the consciousness of people and producing in their minds a new sense of values. Socialism is only the transition phase of communism.

They talk of equal rights in bourgeois States as distinguished from feudal States where there is not even formal recognition of 'equal rights.' But in the first phase of communism, that is, in socialism you have, in addition to equal rights, equal obligations. What does it mean? Well, equal rights without equal obligations mean unequal rights or, worse still, rights for some and practically no rights for the rest of society. You cannot lay down an equal and uniform standard for dissimilar persons, dissimilar in their needs and in their positions. Without a change in the ownership of the means and instruments of production, to talk of equal rights for all is a cruel joke. Therefore, the bourgeois law of equality legalises social inequality.

In the first phase of communism, this foundation of bourgeois social inequality is destroyed by the transformation of the means and instruments of production into socialist property so that two principles are realised, namely, (i) that "he who does not work, neither shall he eat"; and (ii) that there is "an equal quantity of product for an equal quantity of labour." And yet the principle of "an equal quantity of product for an equal quantity of labour" involves some kind of injustice which persists in socialism. But the socialist State seeks to apply a corrective to this injustice by liberal provisions for social amenities. In communism, by contrast, the principle is not "from each according to his ability, to each according to his quantity and quality of labour", but "from each according to his ability, to each according to his requirements." The full application of that principle depends on the planned mobilisation of the forces of production and a radical change in the consciousness of people and their attitude towards life. The resources of the Soviet State are harnessed to these ends.

If in place of the basic economic law of capitalism (maximum profits, development of production with breaks in continuity from boom to crisis and from crisis to boom, periodic breaks in technical development with destruction of the productive forces of society in its wake), you have the basic economic law of socialism (maximum satisfaction of material and cultural requirements of society, unbroken expansion of production and a continuous process of perfecting production on the basis of higher techniques), there is no reason why people should not work according to their ability and rest content with their requirements without asking questions about each other's contributions to the social dividend and requirements. Profit as an incentive to production is the law of scarcity, whereas the law of abundance is not profit but spiritual satisfaction. If you have enough and to spare, you do not care to challenge your neighbour's title. If you know that by your work you assure your present and future, your only incentive to work is work. Profit is a motive force in an unequal society dominated by fear, insecurity and scarcity. It is no element of the communist pattern where, instead, you have hope, security and abundance.

18. The 'Withering Away' of State and Communism

The question now is, will the State remain in the period of communism in which, not to speak of bourgeois inequality, even socialist 'injustice' has been eliminated, and the communist principle of "each according to his requirements" has been achieved? Yes, it will remain, as Stalin puts it, unless the capitalist encirclement is liquidated. No, it will not remain, but will just 'wither away', if the capitalist encirclement is liquidated. You cannot make the State 'wither away' by blowing it up, or pronouncing upon it a sentence of death. The 'withering away' is a dialectical process. Light is thrown on this important question by Stalin in the course of a thesis propounded in 1952, though in a different context.

Many thinkers, among whom may be counted a number of communist theoreticians, believe that the conversion of

the property of individuals or of groups of individuals into State property is the best, if not the only, form of nationalisation. Stalin repels that idea. So long as the State exists, as he observes, conversion of private property into State property is the most natural initial form of nationalisation. But it is by no means the best, far less the only form of nationalisation. Stalin thinks, after Marx, that with socialism installed in the majority of the countries of the world the State will wither away. Should that happen the conversion of private or semi-public property into State property would lose its meaning. The State will have ceased to exist, but society will remain. Consequently, it is not the State but society itself which will become the owner of all public property.

This Stateless society will not be without a Government of its own. No longer will the Government be a coercive machine such as it is today, being the instrument of the State. Thus, the State as a Government of persons will be replaced by a Government which is administration of things. I have already cited instances where old States have been replaced by new States with changes of Governments. I have also cited instances where Governments have changed hands without any change of the States. Here is a possible case in which the State 'wither away' but the Government remains, although it undergoes a transformation both in form and in content. The Governments function then is not to maintain law and order but to minister to the material and cultural needs of the people and society. There is no force or coercion because there is no conflict which gives rise to the State.

CHAPTER II

CITIZENS AND ALIENS

1. From Privilege to Right

It is exceedingly difficult to lay down a general formula as to citizenship in view of the fact that no uniform standard has been followed through the centuries of crowded human history or is recognised and adhered to in different States of the world today. To convey the idea in a vague way the words 'subject', 'resident', 'national' and 'citizen' have been frequently used interchangeably by scholars no less than by the laity. Where and in what respects these words differ in their respective meanings I shall presently explain. But, as has been shown in the preceding chapter, there cannot be a State without a people. The very idea of an organised political community implies an association or group of persons who render it obedience for some reason or other. These persons owe the State allegiance and are, at the same time, entitled to its protection. As Chief Justice Waite observed in the well-known American case of *Minor v. Happersett* (1875), allegiance and protection are, in this connection, reciprocal obligations. It has been found necessary to give a name to this membership. The expression 'citizen' is the familiar title by which these persons and their relation to the State are generally designated. Consequently, citizens of a State are those persons who are subject to its jurisdiction and entitled to its protection. The reciprocal obligations are regulated primarily by municipal law, each State deciding for itself, subject in certain cases to international agreements, who its citizens, nationals or subjects are, or shall be. Accordingly, it follows more or less that persons born within the dominion of a State and/or subject to its jurisdiction, generally speaking, are its citizens.

It is, however, wrong to think that this principle has been uniformly followed since the beginning of history. Nor is this a universal rule in modern times, although the old restrictions and reservations have been removed to a large extent under the inexorable pressure of circumstances. In ancient times citizenship was a privilege. It was reserved for some; others were excluded from it. This discrimination, based as it was mainly on race, caste or religion, was a political counterpart, as it were, of the scarcity theory in economic science. Examples of this pattern of social control are furnished by the division of peoples in ancient Indian society into Aryans and non-Aryans, into owners and slaves; in Athens into citizens and subjects; and in Rome into patricians and plebeians. Hundreds of years afterwards, to be precise, in the seventh century of the Christian era, one finds in the revelations of the Holy Qur-An and in the commentaries thereon the division of people into *ansars*, *muhajirins*, *jimmis*, *kafirs* and slaves. The slaves that had been emancipated by the Prophet came to be known as freed men as distinguished from free men.

In comparatively recent times, too, the division of citizens into privileged and non-privileged classes has not been completely eliminated as, for instance, the 'whites' and 'non-whites' in South Africa, the 'whites' and Negroes in the United States, natural-born citizens and naturalised citizens in different States of the world. In our own country the Constituent Assembly that has framed our constitution was brought into existence by a British Act on the basis of an extremely restricted franchise. Precisely on that franchise the Pakistani Constituent Assembly and legislatures have been functioning for these years. In both the cases the franchise was based on property or educational qualifications in terms of the Government of India Act, 1935.

Under British rule we were all British subjects, and not citizens; and if some of us had franchise, we had it as subjects of His Britannic Majesty. That was our position when the transfer of power took place in 1947. It continued until the inauguration of our new constitution in

January, 1950, when for the first time the term 'citizenship' was introduced as part of our law. During the entire period from British rule right up to the day of the inauguration of our constitution, we had no citizenship. On the transfer of power India was an 'independent Dominion' in terms of the Independence Act, but it was, curiously enough, an independent Dominion of British subjects. It had no citizens in a technical, legal sense. Gandhiji died as a distinguished British subject, and precisely in that capacity Pandit Nehru led the Government of India as our first Prime Minister for about four years. Despite the introduction of adult franchise under our present constitution, property or educational qualifications continue to be the *sine qua non* of the franchise for local self-governing bodies in many of the States.

There is nevertheless little or no doubt that in our time no section or class of people of a given country are excluded from citizenship except on special grounds. It is further clear that classification of citizens with voting rights and citizens without voting rights has been or is being abolished. For this certain factors seem to be responsible. The forces released by the Industrial Revolution rendered it essential that uprooted men and women should be formally free to sell themselves as a commodity to the capitalists and industrialists. In the course of the struggle between the rising bourgeoisie and the tottering feudal aristocracy the working class and the other lower strata of society had to be mobilised in support of the former. In the process they were admitted to the citizen-body and the franchise was widened as a method of appeasement. The period that followed the accretion of power, on an increasing scale, to the capitalists and industrialists, was marked in the west by an emphasis, material as well as psychological, on the sovereignty of States and the demarcation of their boundaries in conformity with the so-called national sentiment.

This national sentiment assiduously fostered by the ruling class and their ideological exponents created among the general body of inhabitants the illusion of a sense of oneness

with the State and its machinery, and served as a bulwark of internal peace and security. Externally, it provided the basis for colonial exploitation and expansion, for aggressive wars and for defence during emergency against attacks or designs by any foreign power. On the political plane, a large proportion of the inhabitants were given the power to vote. On the economic plane, they were admitted to a share, however small and insignificant, of the spoils of colonial exploitation. During this period the old division of people into citizens and slaves was, on the whole, eliminated in the predominantly industrialised States, but the division of citizens into privileged and non-privileged classes continued to a certain extent, so that all persons deemed to be citizens had no right to vote.

Then again, towards the end of the nineteenth century and during the first quarter of the twentieth, a capitalist crisis set in, on account of sharpening internal contradictions, keen and acute competition among capitalist powers and the social and political upsurge among colonial peoples. The First World War broke out in 1914, and amongst its other consequences we find the national States adopting universal franchise as the basis of their formal democracies with a view to persuading the masses to nurse the illusion that they had power alike to set up Governments and to overthrow them at pleasure.

It is not suggested, however, that all these innovations had been introduced solely by the generous efforts of the ruling class and that there was no pressure from below. What is meant instead is that there was a continuous conflict internally and externally. The productive relations could not keep pace with the forces of production. In the end, except where the State power was seized by armed revolt, as in Russia in 1917, there was a compromise between the ruling class and the rest of the citizenry. Adult suffrage and mild social and economic readjustments were conceded within the basic economy of the State and subject to its coercive power. It must nevertheless be admitted that these were, within limits, far-reaching changes, and paved the way to a higher phase of social development.

To say, as has been said by certain British and American authors, that universal citizenship and adult franchise have been brought about by the abolition of slavery and serfdom, and the division of the world into sovereign national States, is to take a superficial and formalistic view of these exciting changes in the political scene. In interpreting these changes one has to go deep down to the root of the problem, that is, the causes that led to the abolition of slavery and other forms of subjugation and the deification of the national States. As has been pointed out above, the causes of those social and political changes are to be sought in the changes in the material conditions, in the contradictions of capitalism and in the mode of production.

2. Tests of Eligibility for Citizenship

What does citizenship precisely mean? It means only that a person is within the allegiance of a State and within such protection as it may provide. It is not a right in itself. It is only a condition, a premise, upon which are determined the rights and obligations of a person subject to the jurisdiction of a given State. One finds in books on political science elaborate discussions on rights and obligations of citizens. It is assumed that rights automatically flow from citizenship. That is a wrong assumption. Citizens may have political rights; they may be without such rights. Sometimes discrimination is made between citizens *qua* citizens on some ground or other. Aristotle's definition of a citizen as one who has a share in the Government of the State and is entitled to enjoy its honours does not accord with the modern theory or practice. There was no place in the Greek City-State for slaves or subjects. It was a direct democracy only for the elite or the privileged class, and members of this class were equal participators in its rights and privileges, in its advantages and immunities. This historical setting will explain the theory associated with Aristotle. It is further assumed that citizens enjoy all rights, political as well as civil, whereas aliens are denied all political rights. This, again, is a half-truth.

While it is a general rule to refuse political rights to aliens, it is by no means universally true that citizens are given all political rights. Citizenship just confers a status, and that is all. Rights and obligations depend on the class character of the State, and on its social and economic norm.

Citizenship is acquired by birth, descent, domicile, long residence, or naturalisation. In earlier times they classified citizens roughly into two categories, that is, (i) citizens by *jus soli*, and (ii) citizens by *jus sanguinis*. The first category of citizens were determined, more or less, with reference to soil, that is, to the place of birth. By the law of the soil, a person, born in a country, is normally a citizen of that country. This rule is generally followed in the United Kingdom, being part of the English common law. The English law recognises the doctrine of *jus sanguinis* as well. Children born of British parents abroad are treated as British subjects, and the expression "British subject" in this context means a "British citizen". The principle of *jus soli* is incorporated in the Fourteenth Amendment of the USA constitution. But the USA also recognises *jus sanguinis*. For instance, children born of American parents abroad, may be admitted to American citizenship. The second category of citizens were determined, as a rule, with reference to blood. By the law of the blood, which is traceable to Rome and prevails in the continent of Europe, a person acquires the citizenship of his parents, irrespective of his place of birth.

The classification into these two broad categories is not, however, adequate or precise. In our time, of course, account is taken almost everywhere, though not in the same manner and to the same extent, of the twin doctrines of *jus soli* and *jus sanguinis*. But other considerations are also given weight. For instance, in the USSR citizens are (i) persons who were born on November, 7, 1917, subjects of the former Russian Empire, and have not lost Soviet citizenship; and (ii) persons who have acquired Soviet citizenship in the legally established order. Previously under the regulations of 1924 and 1931, every person found in the territory was

acknowledged to be a citizen in so far as it was not proved that he was a citizen of a foreign State. Those regulations have been repealed by a new law of USSR citizenship. It provides that independently of their nationality and race, foreigners are admitted to USSR citizenship by the Presidium of the USSR Supreme Soviet or by its counterpart of a Union Republic, within whose bounds they live, upon petition addressed to the appropriate authority or authorities by the persons concerned. Renunciation of the USSR citizenship may be likewise permitted only by the Presidium of the USSR Supreme Soviet.

The Soviet law relating to the acquisition or loss of citizenship by marriage is significant. It differs fundamentally from the principle that the citizenship of the wife follows that of the husband. A Soviet girl marrying a foreigner, according to the Soviet law, does not lose her Soviet citizenship and acquire the citizenship of her husband. This has been Soviet practice since the October-November Revolution, and reiterated in the new law. But it has introduced an innovation as well. As a precaution against infiltration of undesirable foreign elements, the present Soviet law says that marriage with a Soviet citizen does not, as previous law did, render a foreigner *ipso jure* a Soviet citizen. The citizenship of minor children, that is, of children under fourteen years, is determined by the citizenship of their male or female parent according as arrangements are made in that behalf. Those between fourteen and eighteen years choose their own citizenship.

A person in the USSR, who has no proofs of foreign citizenship but who is not admitted to Soviet citizenship, enjoys all the rights of Soviet citizenship, and has to bear all the obligations incidental thereto, except the political rights and such obligations as military service in the Red Army. A Soviet citizen may be deprived of his citizenship (i) by a judicial verdict, or (ii) by a decree passed by the Presidium of the USSR Supreme Soviet. From all this it is clear that considerations other than the doctrines of *jus soli* and *jus sanguinis* also enter into the determination of the acquisition or loss of USSR citizenship.

3. Dual Citizenship

In the USSR, as in the USA, there are two kinds of citizenship: (i) USSR citizenship, and (ii) Union Republic citizenship (article 21). The constitution of each Union Republic provides that its citizens are also USSR citizens, and that citizens of any other Union Republic enjoy, within its territory, like or similar rights with its own citizens. No discrimination is permitted on grounds of domicile, residence, birth, race or nationality. Although in the USA two kinds of citizenship, namely, Federal and State, are recognised (article XIV), as in the USSR, there is nothing in the constitution prohibiting States from promulgating different or even discriminatory laws in respect of electoral or like matters. All that the constitution lays down is that no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. These privileges or immunities are not such as may prevent a State from depriving, say, its Negro residents of franchise on the ground of their alleged educational inadequacy or political immaturity. The due process clause or the equal protection of law clause, whose benefit is supposed to extend to all persons irrespective of their citizenship, is necessarily no adequate and effective safeguard.

It is true that the Supreme Court's ruling in the famous case of *Dred Scott v. Sanford* (1857) has been rendered obsolete by the Fourteenth Amendment (1866-1868) and the decision in *Wong Kim Ark* case (1898). A State's power to discriminate, unlike the Soviet law, has not, however, been completely destroyed. What happened in the *Dred Scott* case was that a Negro by that name from Missouri, then a slave State, appeared before the court and sued for his freedom on the ground that he had been brought to Illinois, a free State, by his master. The lower court decided in his favour, but on appeal the Supreme Court held that a person of African descent, whether slave or not, could not acquire citizenship in the United States, and set aside the judgment of the court below.

The aforesaid amendment, which was adopted after the Civil War, provides that "all persons born or naturalised in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside". Thus the basis for universal citizenship is apparently laid on the ground of birth or of naturalisation. But neither birth nor naturalisation is sufficient for the purpose. The person concerned must be subject to the jurisdiction of the United States. Once a citizen of the United States a person automatically becomes a citizen of any of the forty eight States, whether he is born or resides in that State or moves thereto.

In the case of *Wong Kim Ark*, which was decided in the light of this amendment, the facts, briefly, were these: Wong Kim Ark, who had been born in San Francisco, was refused entry into the United States as a citizen on his return from China. His parents were not citizens of the United States. The issue was whether Wong Kim Ark was a citizen. The Supreme Court ruled that he was. He was born in the United States; and so far as the other condition was concerned, namely, whether he was subject to its jurisdiction, he was deemed by the Court to have fulfilled it. In the opinion of the Court, only two classes of people born in the United States were, conceivably, not subject to its jurisdiction: (i) persons born of alien enemies in hostile occupation of the United States, and (ii) children of diplomatic representatives of foreign States. Wong Kim Ark belonged to neither class, and he was, accordingly, a citizen of the United States by reason of his birth and of his subjection to its jurisdiction. The amendment and the ruling in this well-known case must not, however, be construed as having made accessible to all citizens in all the forty-eight States complete equality in respect of civil and political rights. A dual citizenship, with distinct and separate privileges and immunities, is a clearly recognised rule in the United States.

A passing notice of the subject on an international plane seems called for in view of the confusion caused by divided allegiances involuntarily owed by certain people.

Persons, for example, born in the United Kingdom or in the USA of parents, who are citizens of countries following the *jus sanguinis* rule, as in the European Continent, acquire dual nationality. They are British or USA nationals *jus soli*, and citizens of their parents' country *jus sanguinis*.

It is interesting to learn that from the earliest times in England persons popularly called citizens have been known as British subjects. But recently the expression 'citizen' has been introduced into an Act of Parliament. But a 'British subject' and a 'British citizen' are not interchangeable expressions. All British citizens are British subjects, but all British subjects are not British citizens. A Pakistani citizen, for instance, is a British subject, but he is not a British citizen.

The term 'British subject' recalls to one's mind those days in England when the King was an absolute monarch. The King represented the entire power of the organised political community. The people's loyalty to the State was, in fact and in law, allegiance to the King. Since then many events have taken place, great reforms have been introduced and the whole idea of kingship has substantially changed. In England the King or the Queen reigns, but no longer governs. But mankind is by nature conservative, and Britons are exceptionally so. Therefore, despite the vast changes, that have occurred in the course of centuries, the fiction remains that loyalty to the State is allegiance to the King. For that reason perhaps the old custom of calling a British citizen a British subject is still zealously maintained. Historically, however, it is the legacy of the ancient Athenian custom of dividing the people into citizens and subjects. Now it is no more than a fiction of law.

In our country, too, occasionally eminent men, including judges and statesmen, describe our people as subjects of the Indian Union, instead of calling them citizens. That is wrong. But long-standing custom, like prejudice, dies hard and we have long been taught to call ourselves British subjects. And some judges find it difficult to shake off the old habit and adjust themselves to new social phenomena. Here in

our country we have no subjects. We are citizens, because our allegiance is not to the President, far less to a feudal chief, but to the State which is republican in form. What is no less important, our constitution does not recognise a status implied in subjecthood, if I may use that expression. It states who at its commencement are to be treated as citizens.

4. Indian Law of Citizenship

In dealing with our present law relating to citizenship, at the very outset two points should be kept in mind. First, it is in the nature of a transitional constitutional provision. Applicable to certain categories of persons only *at the commencement* of the constitution it deprives a considerable number of people who are eligible for it by generally recognised tests. It is doubtful, for instance, if children born of Indian parents within Indian territory *after the commencement* of the constitution are citizens. There is nothing in the law to show that they take the citizenship of their parents. Nor do foreign women marrying Indian citizens become Indian citizens. It is, however, left open to Parliament to make provision, by simple legislation, with respect to the acquisition and termination of citizenship and all other matters relating to citizenship (article 11). Secondly, the law provides for one uniform citizenship, that is, citizenship of India. There is no State citizenship, as in the USA or the USSR, with the exception of the State of Jammu and Kashmir. While recognising that Kashmiris are Indian citizens, the State insists that they are citizens of the State as well. This is dual citizenship for which the constitution, as it stands, makes no provision. It is unconstitutional and, on the face of it, invalid. But then it is not clear, contrary to Pandit Nehru's repeated assertions and the relevant articles and schedule of the constitution, whether that State is part of the territory of India, regard being had to its accession being in dispute before the Security Council.

According to the present law (Part II), you are citizens if you are domiciled in the country and if you or

either of your parents have been born here. By this test the late Dr. Shyama Prosad Mookerjee, the well-known Jan Sangh leader and ex-Vice-Chancellor of Calcutta University, was a citizen of India. He was born in India and was domiciled here. On the other hand, born in India, Dr. Tarak Nath Das, who has made America his home, is not an Indian citizen. He is not an Indian citizen because he has lost Indian domicile.

You are citizens also, if you are domiciled in the country and have been ordinarily resident here for not less than five years immediately preceding the 26th January, 1950. By this test Dr. Meghnad Saha, the distinguished scientist, is an Indian citizen. He was born in what is now known as Pakistan but has been domiciled and resident here for the stated period. Thus you see that domicile is essential to the acquisition of citizenship. To that criterion must be added either (i) one's own birth or the birth of father or mother or (ii) residence for a specified period.

Many in this country are naturally anxious to know what the position is as to thousands of people who have migrated to India from Pakistan or may, in future, cross the border and want to settle down in this country. Are they at present citizens of India? That is the first question. The second question, I presume, is, will they in future be treated as citizens of India? In consequence of partition large movements of populations across the frontiers have taken place. Now, those, who or either of whose parents or any of whose grandparents had been born in undivided India, are citizens if they migrated to this country from Pakistan before the 19th July, 1948, and have since been ordinarily resident here.

Those amongst them, who migrated on the 19th July, 1948, or after that date, are also citizens, if they had been recognised and registered as such by a competent officer on behalf of the Government of India before the 26th January, 1950. In the case of those persons, however, there is a rule to the effect that they were not to be registered unless they had been resident in India for at

least six months preceding the date of their application for citizenship. That means that migrants from Pakistan, who fall in this category, that is, those who migrated on the 19th July, 1948, or after that date, were not entitled to Indian citizenship, unless they had applied to the appropriate authority on or before the 25th July, 1949. That period covers six months from the date of application to the date of commencement of the constitution, which is the 26th January, 1950.

It is thus clear that migrants from Pakistan who might have applied for registration as Indian citizens after the 25th July, 1949, were not eligible for Indian citizenship. There are thousands of such migrants in West Bengal and in other parts of India. Their position is peculiar. They are not citizens of this country. But are they citizens of Pakistan? Perhaps no. They have lost Pakistani citizenship on the ground that they have been resident, ordinarily, in India after August, 1947. For, the relevant law in Pakistan (The Pakistan Citizenship Act, 1951, section 3) says in effect that permanent residence in a country outside Pakistan after the 14th August, 1947, would be treated as renunciation of Pakistani citizenship. In a sense, therefore, many of these migrants are Stateless persons. It was open to them to apply for Pakistani citizenship to the appropriate authority within one year of the commencement of the Pakistan Citizenship Act, that is, within one year from the 13th April, 1951. It was, however, in the sole discretion of the Central Government of Pakistan, after due enquiry, to pass such orders on these applications as they deemed fit. There are reasons to believe that a number of such migrants from Pakistan have taken advantage of this provision and since been admitted to Pakistani citizenship. Again, thousands of children born of Indian parents after the commencement of the constitution are, at the present moment, without any status except that they have Indian parentage; they are apparently Stateless. There are no provisions, as I have already pointed out, as to their eligibility for Indian citizenship. One should, however, make no mistake on this point. It is open to

Parliament at any time to enact laws admitting them to citizenship.

Provisions have been made in the constitution for acquisition of citizenship by Indian migrants to Pakistan on return as well as by Indians ordinarily residing in any country outside what was previously known as undivided India. But in both these cases certain conditions had or will have to be fulfilled. As regards the first category, any person otherwise eligible for Indian citizenship, is, as a normal rule, excluded from it if he migrated to Pakistan after March, 1947. Should he return to India under a permit for resettlement or permanent return, issued by or under the authority of any law, he would be treated as if he had migrated to India from Pakistan after July 19, 1948. As regards the second category, any person, who or either of whose parents or any of whose grandparents was born in undivided India, and also is ordinarily residing in any country other than India or Pakistan, is eligible for Indian citizenship by registration by India's relevant diplomatic or consular representative before or after the commencement of the constitution.

We have thus at the commencement of our constitution (i) citizens by domicile and birth; (ii) citizens by domicile and descent; (iii) citizens by domicile and residence ; (iv) citizens by migration from Pakistan; and (v) citizens by registration. According to English law also, there are citizens by registration. It should be noted that any Indian citizen, who voluntarily acquires foreign citizenship, loses his Indian citizenship.

5. Naturalisation as Basis of Citizenship

Apart from these different categories of citizens, provision is made generally in all countries for admission to citizenship of aliens by what is known as naturalisation. Such persons are called naturalised citizens as distinguished from natural-born citizens. Conditions of naturalisation may vary from country to country. An oath of allegiance is, as a general rule, insisted upon everywhere. In addition, certain States, for instance, the United States, demand

knowledge of the language of the country and of the constitution on the part of the person applying for naturalisation.

I have, incidentally, come across several passports issued under the authority of the Government of India to migrants from Pakistan who have become citizens under the relevant articles of our constitution. In these passports the national status of these persons has been described as 'citizens under naturalisation'. The description thus given is not accurate; it does not meet the requirements of law. There is still a Naturalisation Act in India which was enacted by the Central Legislature in 1926. It has since been adapted in the light of the constitutional changes that have taken place. The persons referred to above have not been naturalised under that Act. As a matter of fact, only aliens are admitted to citizenship by naturalisation. Those migrants from Pakistan were not aliens in any sense of the term and, as such, could not be brought within the purview of the existing naturalisation law. They are citizens in terms of the Indian constitution which makes no provision for citizenship by naturalisation. You may call them citizens by migration or citizens by registration, but they are not naturalised citizens.

As regards citizens, one should bear in mind one important point. There are, as has already been shown, naturalised citizens as well as natural-born citizens. Foreigners may be naturalised as citizens of a country on fulfilment of certain conditions. There are different statutory provisions in different countries for admission, by naturalisation, of foreigners to citizenship. The point is that very often natural-born citizens and naturalised citizens are not treated on terms of equality. In America, for example, no person other than a natural-born citizen is eligible for the office of the President or that of the Vice-President [article II (4)]. Neither of these offices is open to a naturalised citizen, or even to a 'national' who is not a natural-born citizen.

Naturalisation may be divided into three classes, that is, (i) group or collective naturalisation ; (ii) naturalisation

by reason of service in the employ of the State; and (iii) individual naturalisation. The third is the common method of naturalisation. The inhabitants of Alaska, Florida and the Virgin Islands were admitted *en block* to the USA citizenship by naturalisation. It is a case of group or collective naturalisation. It should be remembered, however, that annexation of territory does not, as a matter of course, result in the bestowal of American citizenship upon its inhabitants. It is for Congress to decide, by legislation, the question in each case of annexation. The British law is different. Allegiance to the Crown is automatic throughout its possessions, dependencies or dominions, whether acquired by conquest, cession or annexation. The inhabitants of these possessions, dependencies or dominions are natural-born British subjects, though not necessarily British citizens. There is provision in the Pakistan Citizenship Act for admission to Pakistani citizenship of persons connected with any territory which will have been incorporated in Pakistan (section 13). The rule made in this behalf (rule 18) contemplates some sort of group or collective admission to citizenship, although the Government reserve to themselves the right to determine each case individually.

6. Confusion between Domicile and Residence

One would like to know what is meant by domicile. One may want to know also whether there is any difference between domicile and residence. Confusion exists in the minds of many people about the meanings of these words. Domicile is not mere residence. It is not nationality either. Nationality, used in the sense of citizenship, gives one one's political status. It depends, apart from naturalisation, registration or migration, upon the place of birth (*jus soli*) or upon parentage (*jus sanguinis*). Domicile, on the other hand, determines one's civil status. The political status may depend on different laws in different countries, whereas the civil status is governed by domicile. Domicile implies two things. It implies (i) the fact of residence (*factum*), and (ii) the intention to reside indefinitely (*animus*).

Therefore, a person resident in a country for a long period may not necessarily have acquired that country's domicile.

Reference may be made to the well-known case of a man with the Scottish domicile of origin (*Fopp v. Wood*, 1865). That man had come out to India in 1805, and was engaged in business until 1825, when he died at Calcutta. During this long period he had made only one visit to his Scottish home, and stayed there for one year. While back in Scotland he looked after the management of his family estate and took certain steps for its improvement. On his return to India he kept up correspondence with his Scottish estate agents and frequently expressed his intention to return to Scotland. It was held that his Scottish domicile of origin had not been lost. The fact of residence was there. It was a case of almost continuous residence in India for a quarter of a century. What was lacking was his intention to reside indefinitely in India, and to make this country his permanent home. On the contrary, his intention to return to Scotland was established beyond doubt by his interest in his Scottish estate and his correspondence.

Conversely, a person resident in a country for a very short period may be deemed to have acquired the domicile of that country. This kind of change of domicile often occurs when in consequence of a political change a person winds up his affairs in the country of his origin and migrates to another country with his family. Suppose a Jessore man abandoned his ancestral home (Pakistan) in the morning of August 15, 1947, and came to Bongaon (India) with his family with the intention to settle down permanently in the latter place. Then after having left his baggage in his new home he returned to Jessore in the evening to dine with a friend and spend the night there. Suddenly he fell ill and died at Jessore. In the eye of law he died domiciled in India. An illustration of this principle is found in the well-known American case of *White v. Tennant* (1888).

The test, apart from the fact of residence, is the intention, on the part of the person concerned to reside

permanently. The intention is to be gathered not merely by a declaration as to intention but by the circumstances in each case as evidenced by the person's behaviour in private relations and public affairs. The criteria of intention as recognised in several English cases are naturalisation, a statutory declaration, the place where a man's wife and family reside, the place where children are established in business, the exercise of political rights, the purchase of a house or of a burial ground. It is not to be supposed, however, that each of these criteria is a decisive factor, but due weight is given to it in determining the intention of a person. The relative value of some of these criteria was considered by the House of Lords in *Wahl v. A-G.* (1932). For the acquisition of a domicile, residence without intention, or, intention without residence, will not do. But the one or the other will be sufficient for the retention of an existing domicile.

It is interesting to note that in law a person may be Stateless but that there is no person without a domicile. A domicile of origin is assigned to every person at his birth so that a legitimate child has, as a general rule, the domicile of his father and an illegitimate child the domicile of his mother. Even a nomad is supposed to have his domicile because the idea is that he has the domicile of the place where he is found for the time being. But he is a Stateless person. He is without citizenship. Allegiance to the State is the foundation of citizenship, and a nomad is not within its allegiance.

7. Nationals, Aliens and British Subjects

An attempt has been made to explain the word 'citizen' in general, and also, in particular, the qualifications, as to eligibility for Indian citizenship. An idea of what is meant by domicile, as distinguished from residence, has further been given. Expressions like 'nationals' and 'aliens' are frequently used in contemporary literature. But there are vague ideas about them, and it is necessary that one should know precisely what these expressions stand for.

The word 'nationals' has two meanings. 'Nationals' of a country, for instance, are persons who are bound together by certain common ties such as a common memory, a common sense of grievance, a common historical tradition and a common ideal. In this sense sometimes we loosely call Indians resident in South Africa our nationals. In another but in a more technical sense, 'nationals' are bound together by a common allegiance to an organised political community, that is, a State. In this sense, nationals and citizens are, on the whole, interchangeable terms. From the standpoint of international law, however, the term 'nationality' has a broader meaning and refers to the juridical status of a person, regardless of his rights and obligations as a citizen in municipal law. While, according to modern theory and practice, the question of nationality is not, in principle, subject to international law, the right of a State to use its discretion in this regard is nevertheless restricted by obligations which it may have undertaken towards other States. In this perspective a jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.

In England for years the expression 'British national' has been used, more or less, as a synonym for the expression 'British subject'. In America, on the other hand, some difference is made between nationals and citizens. All American citizens are nationals of America but all nationals of America are not American citizens. Where citizenship has been specifically withheld, the inhabitants of territories ceded to the United States are not 'citizens' ; they are 'nationals'. As 'nationals' of the United States they are, at international law, entitled to the diplomatic protection and immunities abroad. But they may not enjoy the rights of citizens, particularly of natural-born citizens.

In our country and in Pakistan, too, the term 'nationals' is sometimes loosely used. It is not yet precisely defined in any law. Occasionally by 'nationals' they mean citizens. In a different context by 'nationals' they mean Indians or Pakistanis, as the case may be, who are resident abroad, but who may or may not be Indian or Pakistani citizens.

Where such persons are not citizens, they are not entitled, unlike the USA nationals, to the diplomatic protection of the Government of India and of the Pakistani Government respectively.

The words 'aliens' and 'foreigners' have the same meaning in law. Aliens, generally speaking, are persons other than citizens of a country. They may be citizens of a foreign country, or they may have no political status. They may be Stateless. Americans are aliens in India, and so also are the Chinese and citizens of the USSR. One may be wondering why I have named Americans, Chinese, and Soviet citizens instead of Britons, Pakistanis and Canadians. There are reasons for it. I shall presently explain those reasons. Of course, our constitution has laid down that any State other than India means a foreign State [article 367 (3)]. According to this law, Britain, Pakistan and Canada are foreign States. Therefore, citizens of these countries are, on the face of it, aliens or foreigners in India. But the constitution also says, by way of a proviso to the aforementioned article, that an order may be issued by the President to declare any State not to be a foreign State for any purpose specified in the order. By the Constitution (Declaration as to Foreign States) Order, made by the relevant authority in January 1950, Commonwealth States have been declared not to be foreign States. Consequently, Britons, Pakistanis, Canadians, Australians and South Africans are not, strictly speaking, aliens or foreigners in our country. Parliament may, however, make a law amending or revoking this order.

It may now be asked whether citizens of the Commonwealth countries are Indian citizens. The answer is that they are neither aliens nor citizens. They are not aliens in the sense that Mr. Eisenhower, M. Malenkov and M. Mao Tse-tung are aliens. They are not citizens in the sense that Sri Nehru, Sri Rajagopalachariar and Dr. B. C. Roy are citizens. Not being citizens, they are, like the aliens, not entitled to the political or some other rights exclusively reserved for citizens. Not being aliens, they are, unlike the aliens, eligible for appointment as jurors in

Indian trials by jury. An Englishman or a Pakistani, for instance, may be chosen as a juror, but the appointment of a citizen of the USSR or of China as a juror may be effectively opposed on the ground of alienage (Cr.P.C. section 278). Again the Registration of Foreigners Act, 1939, which provides for the registration of foreigners entering, being present in, and departing from India, and which, with necessary adaptations, is still in force, does not apply to British subjects domiciled in United Kingdom (section 3). For this amongst other reasons the Government of India are finding it difficult to gather correct information as to the number of Britons engaged in business, trade, or manufacturing interests or otherwise non-officially employed in India.

8. Commonwealth Citizens as British Subjects

There is another important matter, to which I should like to draw your attention. The British Nationality Act, 1948, lays down that a citizen of the United Kingdom and colonies or a citizen of any Commonwealth country shall, by virtue of such citizenship, have the status of a British subject. Any person having the aforesaid status may be known either as a British subject or as a Commonwealth citizen. Accordingly, the expression 'British subject' and the expression 'Commonwealth citizen' shall have the same meaning. The Commonwealth countries, referred to in the statute, include India, Pakistan, Ceylon, Canada, Australia and the Union of South Africa (section 1). The definitions of certain expressions, as given in this Act, are significant. 'Alien', for instance, means a person who is not a British subject, a British protected person or a citizen of Eire (old style). So an Indian citizen who has the status of a British subject is not an alien in the United Kingdom and colonies. 'Foreign country' means a country other than the United Kingdom, a colony, a Commonwealth country, Eire, a protectorate, a protected State, a mandated territory and a trust territory (section 32). The framers of our constitution appear to have taken the cue from this British Act in the matter of the definition of 'foreign State'.

The only material difference is that they have added a proviso to the article in question in a vain effort to hide from the public view the far-reaching implications of India's 'voluntary' membership of the Commonwealth. In relation to the United Kingdom and colonies India is not a 'foreign country'. That is English law. In relation to India the United Kingdom and colonies and other Commonwealth countries are not 'foreign States'. That is the Indian law. It is an interesting Commonwealth experiment in reciprocity, a delicate political mechanism of collaborationist strategy.

Pakistan, too, has not lagged behind in making its contribution to this joint enterprise. The Pakistan Citizenship Act, 1951 (section 2) says that an 'alien' means a person who is not a citizen of Pakistan or a Commonwealth citizen. A 'Commonwealth citizen', according to the amended Act, 1952, means a person who has the status of a Commonwealth citizen under the British Nationality Act, 1948. So if we are Commonwealth citizens, as apparently we are by virtue of our status as Indian citizens, we are not aliens in Pakistan. Our position in, or in relation to, Pakistan is exactly the same as that of Pakistan is in, or in relation to, India. Save for certain purposes as specified in appropriate statutes, in neither of these two countries are British subjects aliens, from whichever part of the Commonwealth they may come. It is thus clear that the Commonwealth membership is not a fiction; it is a grand, inexorable and pervasive reality.

A word or two may be added here by way of elucidation of the peculiar position of the Republic of Ireland, formerly known as Eire. Notwithstanding that under the Ireland Act, 1949, the Republic is no longer part of the Queen's dominions (section 1), it is not a foreign country in relation to the United Kingdom and colonies for the purposes of any law in force in any part thereof (section 2). Accordingly, an Irish citizen who was previously a British subject shall not be deemed to have ceased to be a British subject if at any time he gives notice in writing to the British Secretary of State claiming to remain a British subject on any or all of the grounds specified in the British Nationality Act,

1948 (section 2). The purpose of this Anglo-Irish compromise is to continue certain rights, privileges and immunities for those Irish citizens, who are or have been in the Crown's service in the United Kingdom, or who have associations by way of descent, residence or otherwise with the United Kingdom or with any British colony or protectorate.

The British Nationality Act, 1948, was followed by another British statute, known as the India (Consequential Provision) Act, 1949. It is an Act to make provisions as to the operation of any British law in relation to India, and persons and things in any way belonging to or connected with India, in view of India's becoming a Republic while remaining a member of the Commonwealth. It provides that on and after the date of India's becoming a Republic, all existing British law, whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, shall have the operation in relation to India, and to persons and things in any way belonging to or connected with India, as it would have had if India had not become a Republic (section 1).

The Queen is empowered to make, by Order in Council, provision for such modifications of any existing British law in this regard as may appear to her necessary or expedient in view of India's becoming a Republic while remaining a member of the Commonwealth. An Order in Council may be made according to the Act, either before or after India becomes a Republic, and may be revoked or varied by a subsequent Order in Council. It is subject to amendment in pursuance of a resolution of either House of Parliament (section 3). The Act is intended, as was explained in Parliament, to regularise and stabilise the position and status of men like Lord Sinha, and of many other Indian citizens who have been carrying on their professions in Britain. The whole point, as the Lord Chancellor observed, is that the existing British law remains exactly as it was notwithstanding that India has become a Republic.

Now, our constitution has laid down that no citizen of India shall accept any title from any foreign State [article 18 (2)]. Lord Sinha of Raipur is an Indian citizen. He continues, by the right of inheritance, to be a British Baron by virtue of that British statute and also for the reason that as an Indian citizen he has the status of a British subject and that the United Kingdom is not, technically speaking, a foreign State.

It is, of course, perfectly within the competence of the Indian Parliament to enact laws, which are contrary to all existing British laws. For instance, it can by law say that Britain and, for that matter the other Commonwealth countries are foreign States. It can say that citizens of those countries are aliens or foreigners in our country. It can say that Indian citizens shall not enjoy the status of British subjects in Britain and her colonies. The British laws are now subject, within our country, to our own political sovereignty. But so long as no such law is made by the Indian Parliament, our position in Britain and her colonies is that we enjoy the status of British subjects by reason of our Indian citizenship. We may, of course, call ourselves Commonwealth citizens.

I admit some of the observations made in this chapter may sound fantastic or that the overall picture of the Commonwealth relations may look perplexing. For, it is just natural to presume that the citizens of a sovereign Republic cannot enjoy the status of the subjects of a foreign sovereign, wherever they may be. How, again, can an 'independent Dominion,' one may ask, be a State other than a foreign State in relation to India or to any other foreign State? But, as history shows, the British political system can without much difficulty adjust itself in the hard and bitter struggle for survival to new situations or to new relations of social forces. It breaks up your fallow ground, sows not among thorns. Lo this, we have searched it, so it is—the Commonwealth of freely associated nations! And hear it, and know thou it for thy good. A city that is set on a hill cannot be hid. Neither do men light a candle

and put it under a bushel, but on a candle-stick; and it gives light unto all that are in the house !

Within the territory of India, we are Indian citizens. If we go to any foreign country or to any Commonwealth country we are Indian citizens, and not British subjects. The British laws mentioned above have no application outside the territorial limits of Britain and her colonies.

Now, 'aliens' may be 'enemy aliens' or 'friendly aliens'. Enemy aliens are citizens of a foreign State with which India may be at war. Friendly aliens, on the other hand, are citizens of a foreign State which is not at war with us.

CHAPTER III

FUNDAMENTAL RIGHTS

1. The Role of Symbols in Social Evolution

A somewhat detailed evaluation, by a comparative study, of the Fundamental Rights as guaranteed in our constitution seems necessary against the background of the present-day controversy over the 'democracies' versus the Soviet State. The first question that occurs to one's mind is, how did the idea or the concept of rights originate? In a savage state man obeyed no law except perhaps the law of nature and submitted to no restrictions other than those inherent in his physical and mental inadequacy. When by gradual stages he developed family, gens, tribe and civil society, he accepted certain obligations which, to a certain extent, controlled and regulated his earlier primitive freedom. The ties of affection, of consanguinity, of long and continuous association and of a sense of unity of needs, hopes and aspirations produced, in their turn, an unwritten code of personal and social behaviour which passed from one generation to the next. It was assumed that in so far as, in civil society, obligations were not created and accepted or acquiesced in, man was in full possession of freedom. It was further assumed that he had the right to revolt against a code which had not his tacit assent, and which overstripped the limits of fair and reasonable interference with his freedom. The doctrine of natural rights may be traced to these assumptions, although it is doubtful whether civil society or the State in its rudimentary form had grown and developed along these clear-cut lines, which appear so simple to modern minds.

Side by side with the theory of natural rights emerged the theory of moral rights. What man had as part of nature was his natural right; what it was necessary for him to possess for the full and free enjoyment of what he had inherited from nature was his moral right. In the process

of evolution of these twin principles both natural and moral rights were merged with each other on the doctrine that what was real was reasonable, that what was natural was moral, that what was moral was implanted in the human breast by an unseen mysterious force. Thus a metaphysical twist was given to a concrete, material, historical phenomenon. It is nevertheless a mistake to ignore completely the role of ideas in the evolution of human society. Derived primarily from the external world, they soon evolved a law of their own. Language is the vehicle for the transmission of the social heritage of experience. Every word, however gross and material its meaning, possesses what may be called the quality of abstraction, of classification. When we reason, we operate with the symbols created by words, and *not* with things or actions in the external world. This gives rise to ideology which, however distant from biological needs, is biologically useful; it helps the survival of the species.

I need not dilate on these highly abstract philosophical speculations. The ancient Indian people representing, as they did, a fusion of three or four distinct types of racial groups and a composite culture and civilisation, however, believed that no man should be condemned without hearing. So did the Greeks and the Romans. Among our early ancestors, particularly in the Krishna Vasudeva era it was open to any man by dint of merit to attain to the highest position in the social scale. Recall, for instance, the stirring story of Valmiki, whose great Epic has for centuries moulded the minds and thoughts of countless men and women of India, and continues to be cherished as an inspiring cultural heritage. Who in our country has not heard of Krishna Dvaipayana Vyasa, before whom the court and the crowd alike bowed in reverential awe, and whose codes and institutes, no less than his grand Epic, are our precious and imperishable possessions? This Nestor among the Indian sages, according to his own testimony, was a half-caste, being the son of Parasara (whose mother, again, is said to have been a *chandala* woman) and of Matsyagandha, a fisher-woman.

Indeed, men in all ages and climes have recognised certain immunities of the individual, certain freedoms, though not clearly defined and delimited, as being essential to the organised social life as well as to the development of human personality. Generally, these were carried from mouth to mouth, as in the case of the immortal Vedic songs. Sometimes, however, they were written down, as in the case of the Twelve Tables in Rome or of the Indian Puranas. But it must be noted that on the whole and as a general rule, the immunities did not extend uniformly to all, and that the freedoms were restricted, more or less, to the elite. As Marx and Engels observe: "That Greek and barbarian free-man and slave, *civis* and *cliens*, Roman citizen and Roman subjects (in the broad sense) can assume to be of the same importance politically would have seemed an insane idea to the ancients". So, too, is equal treatment an insane idea to those sophisticated moderns, who discern the hand of mysterious Providence in the havoc wrought by greed and exploitation; in the eternal process of adjustment by the destruction of human beings by war and famine, pestilence and disease; and in the categorical imperative of the privileged plenty amid mass scarcity!

Nevertheless one must give due weight to certain epoch-making events of European history, those landmarks of the social movement for human emancipation. I refer to European history because the rights, as we understand the term to day, are, in the main, western concepts. In 1215, at Runnymede the Barons wrested from King John the famous *Magna Carta*. In 1626 Charles I was forced to sign the Petition of Right. It was followed by the deposition of James II, and installation of William and Mary, and in 1689 the Bill of Rights was added to a fairly long and imposing table of rights, formally for the English people but, to all intents and purposes, for the benefit of the upper strata of society led by the land-owners and a new but growing cadre of 'haves'.

The *Magna Carta* prohibited deprivation of personal liberty and property except in accordance with the *lex terrae*, and without the judgment of the peers, forbade the

sale of justice, and required the King to refrain from what were, in the opinion of the court, arbitrary acts. The Petition of Rights prohibited the raising of taxes without parliamentary sanction, the billeting of soldiers in private homes and the detention of persons, punitive or preventive, without specific charge and regular trial. By the Bill of Rights the Crown was required to maintain no standing army in peace time without parliamentary sanction, and not to dispense with any law. It forbade excessive bail, freed elections from Royal control and gave Parliament and its members freedom of speech and debate inside both the Houses. All these rights are fruits of struggles, bitter and fierce struggles, which the conflict of class interests provoked from time to time. To these may be added the rights acquired by the Star Chamber Abolition Act of 1640, and the Habeas Corpus Act of 1679. In theory, at any rate, these were not rights established for the first time by statutes; these instead were rights which the English people had not surrendered at any time in history, but which had to be put in clear terms in order that the Crown was prevented from encroaching upon them by its fiat or in the exercise of its discretion.

2. The First Written Charter in America

The history of struggles in England, the vague ideas of natural and moral rights and the disquisitions of Locke, Montesquieu and others provided the material, upon which the founders of the American Government apparently worked to build their own pattern and to give it form and content. Why I say 'apparently' will soon be clear. Perhaps the first attempt in recorded history to write out a comprehensive declaration of fundamental rights was John Adams' draft known as the Virginian Declaration of Rights of 1776. The principle that 'all men are by nature free' was the corner-stone of the Declaration. Conformably to that principle it proclaimed the sovereignty of the people, their right to life, liberty, security, property and happiness, the freedom of elections, the equality of political rights, the freedom of the press and the inviolability

of the person. For the purpose of ensuring the exercise of the rights the Declaration proposed the distribution of these State powers among three separate organs. These enunciations, it will be seen, were, more or less, in concrete terms, and almost similar texts were incorporated in the constitutions of several other States.

The leaders of the United States, however, soon realised what to them were the dangerous implications of such constitutional pledges. Consequently, in the Declaration of Independence made by Congress on July 4, 1776, they took care to substitute a didactic but dubious lexicon for the ascertainable and positive texts of the States. of course, they acknowledged that "all men are created equal"; persuaded themselves that all men "are endowed by their Creator with certain inalienable rights"; conceded that among these rights "are life, liberty and the pursuit of happiness". But these were "certain rights", and not rights as clearly and specifically stated in the Virginian Declaration. So a former Captain of the Revolutionary Army, Shays by name, burst out in sorrow and in anger: "The delegates of the Congress seem to fear a triumphant American Army almost as much as they did the soldiers of George III".

The Convention that was summoned at Philadelphia in 1787 to work out the constitution on a federal basis, in contrast with the temper of the Revolution, was a reactionary body. And naturally so, for the ten-year confederal interlude, which started in November, 1777, gave way under the pressure of interests working for a policy advantageous to personalty operations in shipping, and manufacturing and in land speculations of the delegates to the Convention, forty, as Professor Beard shows, held public securities, fifteen were share-holders, fourteen speculated in land and eleven were engaged in mercantile, manufacturing and shipping activities. The small farmer, worker and debtor classes had practically no representation. Those vested interests had a considerable portion of the professional classes, particularly lawyers, attached to them. They exerted a tremendous influence

over the press, as identical interests do in other countries in like circumstances, not only through ownership, but also through advertising and other kinds of patronage. For this obvious reason, therefore, their sympathies as well as their antipathies, their fears no less than their hopes, were reflected in the constitution adopted in September, 1787, and made effective in March, 1789.

This constitution does not contain any Bill of Rights in the real sense of the expression except in so far as it lays down (1) that the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it; (2) that no bill of attainder or *ex post facto* law shall be passed ; (3) that no money shall be drawn from the treasury but in consequence of appropriations made by law, and a regular statement of account of the receipts and expenditures of all public money shall be published from time to time; (4) that the trial of all crimes, except in cases of impeachment, shall be by jury: (5) that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court; and (6) that treason against the United States shall consist only in levying war against it or in adhering to its enemy. The Convention realised early enough that the several State legislatures would offer resistance to the proposed constitution on the ground that the proposals were not adequate for the purpose. Consequently, they decided to refer it to conventions in the States for ratification instead of to the State legislatures.

But the small farmers and debtors made an impressive show of strength as against the conservative forces. This opposition coupled with two great events in France, for example, the adoption by the French National Assembly of the Declaration of Rights of Man and Citizen, and the storming of the Bastille in Paris, forced the hands of the United States Congress. The ratification of the constitution was accorded by such States as Massachusetts, Virginia, and New York upon the definite assurance of the reactionary leaders that a series of

amendments guaranteeing individual rights would be added to the original document. In this historical setting the first ten amendments came to be incorporated in the constitution.

3. Significant New Developments

Before I take up these and subsequent amendments I should say a few words about the contemporaneous events in France and England. In France the Declaration of Rights of Man and Citizen, as embodied in the constitution of 1791, was expanded and liberalised, it is true, in the Jacobian constitution of 1793, which was never put into operation. Two years later the vanguard of the bourgeois-democratic revolution betrayed the interests of the revolutionary rank and file, and refused to acknowledge the right of the people to resist oppression. The conservative social strata were, however, forced to make certain concessions after the revolution of 1840, including manhood suffrage and several other fundamental rights. Some of these rights, again, were rendered inoperative by executive orders and decrees. After the break-up of the Paris Commune the triumphant bourgeoisie completely threw off its democratic mask, and the Declaration of the Rights of Man and Citizen was consigned to the waste paper basket.

In England a newspaper tax was introduced in 1702; the tenure of Parliament was extended from three years to seven years in 1716; and publication of parliamentary proceedings, except under authorisation, was forbidden in 1728. From time to time the Habeas Corpus Act of 1679 was suspended. But the suspension, it should be admitted, did not legalise any arrest or imprisonment. It is generally followed by Acts of Indemnity whereby the officials concerned are protected from the consequences of an illegal act committed by them during the suspension. The object of suspending the *habeas corpus* procedure, as has been held by the Lords in the case of *The King v. Halliday, ex parte Zadig*, 1917, is to enable the executive to commit an illegality. Such illegality is regularised by Indemnity

Act. In consequence of working class pressure organised and mobilised by the Chartist the *habeas corpus* remedy, available under the Act of 1679 against detention on alleged criminal charges, was extended, under an Act of 1816, to civil imprisonment; the legal ban on workers' unions or associations was removed in 1824; and the work-day for children, and later on for adults, was limited by law. The whole period was marked by a series of struggles between, in the first instance, the crumbling feudal forces and the Crown on the one hand and the rising capitalists, taking up the leading role in the popular movement, on the other; and, after the success of the movement, between the capitalists and the rank and file of the revolutionary cadre, that is, the workers and peasants.

One or two points are clear. Even where rights and freedoms have been acknowledged in the constitutions or interpreted by courts as accruing to the people in accordance with the common law principles, they are, on the whole and in essence, no better than empty sound for the vast majority so long as private property in land and in the instruments and means of production is retained in the hands of the privileged few. The formal democratic synthesis amounts, in effect, to exploitation of the majority by the minority under the protection of laws, but in the disguise of civil freedoms and fundamental rights. It contains within itself the germs of a new conflict which is witnessed today in different parts of the 'democratic' world.

The rising capitalists and industrialists cannot win their battles without the support of the exploited masses, and precisely for that reason they use popular and democratic slogans to enlist the co-operation of the latter. In colonial countries, apart from these slogans, recourse is had to a platform of nationalist defence against the onslaught of foreign rule or domination. Sometimes, with the weakening of the foundations of alien domination, an anti-worker and anti-peasant alliance is forged under the cloak of national sovereignty between the beneficiaries of the feudal order, the indigenous owners of the means of production and foreign investors and exploiters. For a

time, maybe long or maybe short according to the circumstances, all the familiar democratic forms, including declarations of freedoms either as justiciable rights or as directive principles of State policy, are retained until an acute crisis upsets the democratic apple-cart. Thus the exploiting classes, dominated by the capitalists, play with weapons which they themselves, by the law of motion in bourgeois society, are forced to put into the hands of the exploited and oppressed majority. These weapons are subsequently used against the exploiting classes. These points one must bear in mind, while trying to reach correct and precise conclusions as to the implications of rights and guarantees acknowledged in constitutions or recognised by courts of law.

4. Implications of American Constitutional Amendments

Now, of the first ten amendments to the USA constitution, eight deal with the rights and immunities of individuals; the ninth seems to reassert the natural rights principle in that the enumeration in the constitution of certain rights is without prejudice to the other rights retained by the people; and the tenth, perhaps on the same principle of natural rights, leaves the residual powers to the States or to the people, as the case may be. In the wake of the civil war, apart from the consolidation of the 'national' power as against the rights of the States, came a further series of amendments bearing on civil rights.

The thirteenth amendment, passed and ratified in 1865, outlaws slavery and involuntary servitude, except as punishment for crime on conviction, in the United States or in any area subject to its jurisdiction. Under the fourteenth amendment passed by Congress in 1866 and ratified in 1868, certain obligations and prohibitions are imposed upon the States. Persons born or naturalised in the United States and subject to its jurisdiction are citizens of the United States as well as of the State wherein they reside. States are prohibited from curtailing or abridging the rights and immunities of citizens, or depriving any person of life, liberty, or property, without due process of law, or

denying to him within their respective jurisdictions the equal protection of the laws. The fifteenth amendment passed by Congress in 1869 and ratified in 1870, prohibits the Centre and the units alike from denying any citizen his franchise on account of race, colour or previous condition of servitude. After the First World War as marking the first phase of capitalist crisis, women's disability in respect of franchise is removed by the nineteenth amendment passed by Congress in 1919 and ratified in 1920.

The rights envisaged in the original formulations as well as in the amendments are often classified into (i) substantive rights, and (ii) procedural rights. Some reject this division and put in their own classification instead. They point out that the major part is concerned with law and the judicial process, whereas the residuary deals with positive rights such as freedom of speech, press, assembly, petition and religion. I do not get at the nice distinction that is sought to be drawn. If it is clear, as it is, that every right possesses both substantive and procedural aspects, it is no less obvious that in modern society rights, law and the judicial process cannot be isolated one from another. They are interlinked. For, indictment by grand jury; trial by jury; the giving of hearing; access to legal advice ; knowledge as to charges; protection against self-incrimination, excessive bail, double jeopardy, unlawful searches and seizures, bill of attainder, *ex post facto* laws; and the provision for the *habeas corpus* writ—surely all these are of as substantive value as the so-called positive rights like freedom of speech and expression, personal liberty and franchise.

I shall later on refer to the construction put on some of these constitutional provisions by the USA Supreme Court by way of a comparative study of our own system and the Soviet law of the constitution. Meanwhile, however, it seems necessary to explain one or two expressions used in the American law. Take, for instance, a Bill of Attainder, a phrase which has virtually gone out of use in the modern texts, although its application has not been

vetoed in all 'democracies'. A Bill of Attainder is a special measure confiscating the property of a person condemned for treason or felony, and depriving him of the right to claim the protection of the court or of the law. Treason, in the American law, is anti-war practice, or a pro-enemy activity, and is, therefore, a war crime, and not a peace delinquency. An *ex post facto* law, where confined to criminal cases, makes an act a crime which was not a crime when committed, and enhances the punishment or otherwise prejudices the accused retrospectively.

5. Fundamental Rights as Classified in the Indian Constitution

Now, what are called Fundamental Rights under Part III of the Indian constitution may be conveniently classified under twelve broad heads, and not under seven heads as has been attempted by some Supreme Court judges and several writers. These are:

(1) Right to equality, as under article 14, which is in the nature of a prohibition preventing the State as defined in article 12 from denying to any person equality before the law or the equal protection of the laws ;

(2) Right to protection against discrimination on certain grounds accorded to citizens subject to limitations, as under article 15, which, again, is in the nature of a prohibition ;

(3) Right to equality of opportunity reserved for citizens in the matter of public employment, subject to certain conditions, as under article 16, which has both positive and negative aspects ;

(4) Right to protection against untouchability accorded to citizens and non-citizens alike, as under article 17;

(5) Right to freedoms assured to citizens subject to certain limitations, as under article 19 ;

(6) Right to protection against *ex post facto* laws, double jeopardy and self-incrimination accorded to citizens and non-citizens alike, as under article 20;

(7) Right to protection of life and personal liberty open to citizens and non-citizens alike, as under article 21, but

subject to the procedure established by law as well as to certain limitations as under article 22 ;

(8) Right to protection against exploitation such as traffic in human beings and *begar* and other similar forms of forced labour, as under article 23, and against employment of child labour in factories etc., as under article 24, accorded to citizens and non-citizens alike;

(9) Right to freedom of conscience and religion, subject to certain limitations, as under articles 25-28, accorded to individuals as well as to institutions irrespective of nationality;

(10) Right to cultural autonomy, and equal access to educational facilities accorded to national minorities, as under articles 29-30 ;

(11) Right to property accorded to citizens and non-citizens alike, subject to certain limitations as under article 31, which, too, is mainly in the nature of a prohibition ; and

(12) Right to legal proceedings through writs, orders or directions from the Supreme Court for the enforcement of the rights guaranteed under this part of the constitution, as under article 32.

Several commentators on the Indian constitution seem to think that in respect of Fundamental Rights the framers have drawn mainly on the constitution of Eire and the Weimar constitution of Germany. In a way they are correct. It, however, appears to me that the draftsmen with a handy collection of select constitutions of the world in their possession looked up this precious document for guidance and inspiration and reproduced in their draft such provisions as, in their judgment, read well or looked imposing. They made, if I may say so with respect, indiscriminate use of that collection, relying generally on the American amendments, the maxims laid down in certain well-known British statutes, and the principle of law as interpreted by British courts. Indeed, these and the French Declaration of the Rights of Man and Citizen are the sources to which almost all the written constitutions of the capitalist States called

'western democracies' are to be traced. Even the lexicon, the turns of phrases, the grammatical twists and the mechanism of exceptions are British, American or French. It is not for nothing that the judges of the Supreme Court or the High Courts should always consult the British or American case law and copiously quote from it in support of their judgments or decisions, or while repelling the contentions which they finally reject.

6. Directive Principles and Fundamental Rights

These fundamental rights must be distinguished, as the framers have done, from what they call the directive principles of State policy—an idea which is borrowed from Eire with a simple twist of language, substituting 'State policy' for 'social policy' for what reason one does not understand. Here at this stage we are not concerned with the directive principles except pointing out incidentally that perhaps they have been inserted in the constitution by way of (i) a programme blue-print for the country; (ii) a policy statement for the benefit of administrative tribunals set up specially to deal with labour disputes; or (iii) an outlet for romantic illusions on the part of the draftsmen. Whatever the purpose, these directive principles are not justiciable rights.

It is, however, interesting to note that in interpreting article 31 in connection with the case of the *State of Bihar v. Kameswar Singh* (1952) one of our Supreme Court judges has made rhetorical use of the preamble as well as of the directive principles in support of the meaning he has been pleased to give to the phrase 'public purposes'. Not that he holds that the provisions as to fundamental rights are controlled by the preamble or the directive principles. Nevertheless there is a clear suggestion that the preamble and the directive principles should be kept in mind in interpreting our constitution in so far, at least, as it may have a bearing upon social policy. According to him, the primacy of the general interest of the community over the interest of the individual pervades our constitution. "What sounded like idealistic slogans only in the recent past", he says, "are now enshrined in the glorious preamble to our

constitution proclaiming the solemn resolve of the people of this country to secure to all citizens justice, social, economic and political, and equality of status and of opportunity". In his enthusiasm the learned judge adds : "What were regarded only yesterday, so to say, as fantastic formulae have now been accepted as directive principles of State policy prominently set out in Part IV of the constitution". There is doubt about the soundness of the view expressed by this judge.

This classification of human interests into what he calls the general interest of the community and the interest of the individual, is reminiscent of the nineteenth century Liberal chatter which was encouraged by expanding capitalism but which the complicated social phenomena of our time most emphatically repudiate. The antithesis was and is not between the communal interest and the individual interest but between the interests of hostile classes in a given community. Evidently the learned judge does not take this fact into consideration but gives expression to an idea which is not relevant to the circumstances of today. Assuming, however, the correctness of his classification, it is wrong to think that our constitution gives priority to the general interest of the community over the interest of the individual. Had it done so, it would not have protected private ownership of the instruments and means of production in the manner it has done. Nor are the enunciations, contained in the 'glorious preamble' and directive principles of State policy, set out in Part IV, anything more than empty sound in the context of stark, cruel reality. Extracts from this judgment have been quoted not by way of subscribing to the learned judge's formulations, but to show that even knowledgeable men allow themselves to nurse illusions, relying entirely on eloquent phrases and stately periods. It must, however, be admitted that the learned judge has used the preamble and the directive principles of State policy in support of a popular cause, and for repelling the contention urged on behalf of the land-owners. But the fact remains that the preamble and the directive principles are not justiciable, and have no operative force.

7. Applicability of the Guarantees

About the fundamental rights, it is worthwhile to stress certain points. First, there are rights which are open to all—citizens, aliens or others. There are rights, however, which are exclusively reserved for citizens only, as for instance, the rights guaranteed under article 19. As has been pointed out above, it gives every citizen, amongst some other rights, the right to freedom of speech and expression. But it does not mean that that right is denied to every person other than a citizen. It does not mean, that is, that a Pakistani, a Briton, an American or a citizen of China residing in this country cannot exercise this right. What it means is that if by some law or order anybody other than a citizen is prevented from exercising this right he cannot seek the prescribed remedy in a competent court of law because for him it is not a fundamental right. It follows from the legal principle that what is not specifically prohibited is licit. And yet it cannot be denied that in this and some other respects it is open to an appropriate authority to follow or practise discrimination to the prejudice of aliens or non-citizens. One will not be surprised if the Government of Pakistan take a leaf out of the Indian book and create complications in regard to the holding or disposal of properties by persons who have migrated to India from that State. It is, I contend, singularly unfortunate that the framers of the Indian constitution should have ignored this aspect of the problem, and introduced rules of discrimination in respect of civil rights on the ground of nationality or citizenship, regard being had particularly to the cultural, economic and historical ties between the two Bengals and their peoples.

Secondly, the fundamental rights, apart from the usual limitations I have already indicated, are subject to the reservations, as under articles 33-34, which Parliament may by law make in the exercise of its ordinary legislative power and in accordance with the ordinary procedure. The reservations as contemplated therein may modify the rights in their application to the armed forces and the police. They may indemnify any person in the employ of the Union

or of any State, or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area where martial law was in force. They may further validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law. These constitutional provisions for the abrogation of the fundamental rights in respect of certain classes of public servants and for certain areas are reproduced almost bodily from the English principles of law, partly incorporated in statutes but mainly interpreted by English courts. Here is another instance where the framers of our constitution do not seem to have applied their minds to the intricate issues involved in the propositions embodied in the relevant provisions.

8. Martial Law and its Significance

For one thing, the expression 'martial law' has nowhere been defined in our constitution. For another, there is no clear entry in the Seventh Schedule showing where the legislative power in respect of this matter precisely belongs. The power of Parliament in this regard may be inferred only from entries 1, 2 and 97 of List I (Union List), and also from the exception made in entry 1 of List 2 (State List). At best, it is an implied Union power. It is curious, however, why it should not have been expressly and specifically allocated to the Centre. The provisions made in article 35 do not, I am afraid, put the issue beyond doubt. For, although the exclusive power to legislate in respect of the matters mentioned in the article is reserved to Parliament, it is restricted in its scope in that the legislation as contemplated in articles 33-34 is to modify the application of fundamental rights to the armed forces and the police, or to indemnify certain acts committed in martial law area or areas. The article does not in specific terms confer on Parliament power to legislate as to martial law.

Incidentally, it is wrong to think, as some commentators appear to have done, that "the power to declare martial law or to use the armed forces to re-establish civil order

is a legislative power". To lay down policy as to what martial law is comes within the legislative sphere. To declare, for any particular area, martial law as laid down by the competent legislature or to use the armed forces to restore order, on the other hand, is the business of the executive, which, of course, is subject to judicial review except where such review is ousted by legislation.

In Britain, which in this respect, as in many other respects, happens to be our guide, martial law is distinguished from military law, which is mainly statutory. Military law is a code of discipline for the armed forces of the Crown. It contains rules of procedure for its application. It is incorporated in the Army Act, the Air Force Act, the Naval Discipline Act, and several other Acts concerning the Auxiliary and Reserve Forces, and the Army Orders, supplemented by Regulations, issued by the Queen under Royal Warrant. The corresponding Indian law is contained in the Indian Army Act of 1911, the Indian Air Force Act of 1932, the Indian Navy (Discipline) Act of 1934, the Territorial Army Act of 1948, and the Orders of the Army, Air Force and Naval Authorities. As in England, so in India, military law is a code to which the armed forces alone are subject. In respect of purely 'military offences' members of the armed forces are triable by military tribunals or courts-martial with the exception of certain serious felonies, but for breaches of the ordinary law they may be tried by ordinary courts as well as by military tribunals on the well-known principle that a person subject to military law does not cease to be subject to the ordinary law.

Martial law, as understood in Britain, is no law in the proper sense of the term. It implies the existence of a certain fact, of a certain state of emergency, in a given country or in a given area or areas of that country where the civil authority, for all practical purposes, is suspended or ceases to function. When such an emergency, in fact, arises it is said to be martial law. No such emergency has occurred in England since the Civil War of the seventeenth century, and from that quarter we have

no authoritative pronouncement. In certain circumstances every citizen is entitled to repel force by force. He is required to assist the State in preserving the peace if and when called upon to do so. So the executive can summon to their aid, at English common law, the armed forces of the Crown and take the law into their own hands. If such a contingency arises, it is a kind of martial law, no matter whether there is or there is not a formal proclamation to that effect. It is, however, open to every citizen to go and seek the protection of courts which decide whether or not martial law prevails. A proclamation may be evidence of the fact of emergency, but it is not conclusive. For a proclamation does not create a situation which, in fact, does not exist.

It has often been suggested that the test as to whether martial law exists or not is whether at the relevant time courts are sitting or not. Another test is suggested, and it is whether the insurrection or civil disorder is of such a nature as to justify military rule to the exclusion of civil authority. It is for the courts to decide this question of fact. Suppose the courts are sitting in a disturbed area where the military have taken over. What happens then? The Privy Council has held in the case of *Mariass v. General Officer Commanding* (1902) that acts of the military are not justiciable by the courts sitting in an area where 'war is raging'. In a state of emergency of the kind contemplated under martial law, a curious situation may arise. If the courts are not sitting, there is no remedy against the acts of the military. If the courts are sitting, the writ of prohibition does not lie because military tribunals are no courts at all, if the House of Lords' ruling in *Re Clifford and O' Sullivan* (1921) is accepted. The writ of *habeas corpus* may be available if the courts hold that war was not raging at the time when the alleged offence was committed. The rules laid down in the aforesaid cases do not bind the citizens of the United Kingdom because they are deduced from decisions on colonial cases.

In Britain martial law is not for the moment a live issue, for there has been no such emergency during the last three

hundred years. The usual practice to tackle problems arising out of a situation in which Britain is at war with a foreign State, is to resort to the DORA or to analogous laws under which certain rights, including the right of petition against preventive detention, are suspended, and to the Indemnity Acts.

In the United States the question of martial law does not arise except in the event of actual invasion, that is, in conditions in which the civil administration is deposed and the courts cannot sit at all. In France, and generally in the European Continent, there is recourse to a declaration of a 'state of seige' by the legislature, or by an authority specially empowered in that behalf. As a result, the power to govern passes into the hands of the military. It is for the legislature or the appropriate authority to define the extent and scope of the powers of the armed forces. In a situation of this kind martial law operates.

So far as India is concerned, the position is rather complex. If martial law means suspension of the Supreme Court and the State High Courts, Parliament is not competent, by ordinary legislation, to provide for it. It requires amendment of the constitution. When, however, a Proclamation of Emergency is in operation, as under article 352, and not a Proclamation as under article 366 or as under article 360, the President may, by order, suspend the operation of the judicial processes for the enforcement of fundamental rights for the duration of the Proclamation or for a shorter period. In such a situation ordinary legislation by Parliament as to martial law, not including the suspension of the courts, will be valid, and perhaps not otherwise. By such legislation certain functions of the courts, but not the courts themselves, may be suspended.

It should be noted that the enumeration of fundamental rights in the constitution does not mean that such other rights as flow from the personal laws or from codes and statutes, are curtailed or taken away. Those rights exist in so far as they are not repugnant to the fundamental rights. The question is, why are these called fundamental rights? Well, there is a vague idea that without these rights there

can be no development of human personality. Like natural or moral rights, whatever the actual meanings of these expressions, these are considered basic to life, liberty, and the pursuit of happiness. That is one reason, though somewhat shrouded in mysticism. Mysticism comes in when ideas lose their social content, when they cease to respond to environment. It is far too frequently forgotten that what is 'basic' or 'fundamental' differs from age to age or from community to community, although it is true that man is theoretically heir to all the ages, and inherits the accumulated experience of his ancestors.

The next reason is that these rights take precedence over other laws as under article 13. If there is any conflict between any of these rights and any other law, then to the extent of the conflict the latter is superseded. Again, the reason is that these are susceptible to judicial adjudication, as contrasted with, or distinguished from, the directive principles of State policy. An individual has direct access to the Supreme Court for the enforcement of fundamental rights, and not for any other purpose (article 32). It is a special jurisdiction of that Court, and is itself a fundamental right. There is provision for access to a State High Court as well for the same purpose, but such right of access is not a fundamental right, though exercisable for the enforcement of a fundamental right as for any other purpose. Last but not least, the reason is that the modification or alteration of any of these rights is treated as a constitutional amendment, and cannot be effected by simple parliamentary legislation and except by resort to the special procedure contemplated under article 368.

9. 'Equality' and 'Equal Protection' Clauses

It is not possible, and not necessary either, to examine in detail each of the articles and each clause of every article. I consider it worthwhile, however, to indicate broadly the possible implications of what, in my opinion, are the most important rights guaranteed under the constitution. Take article 14, which guarantees 'equality

before the law' and the 'equal protection of the laws' to citizens and non-citizens alike. The 'equal protection of the laws' clause has been reproduced from the Fourteenth Amendment (section 1) to the American constitution. The expression 'equality before the law' is taken from one of those maxims of English law which Dicey has included in his Rule of Law. It has been interpreted by Dicey and other commentators, including Hewart, as excluding from the English scene administrative courts or tribunals, and placing everyone, whatever his position, under the ordinary law of the land and under the jurisdiction of the ordinary courts of justice, civil and criminal.

The framers of our constitution must be presumed to have meant two different things for these two different expressions. That one is a synonym for the other is not warranted by the rules of interpretation of statutes. The theory of 'surplusage', too, must be rejected, unless, of course, it is established beyond doubt that but for that theory the two expressions, placed in juxtaposition with one another, yield absurd conclusions. No argument in support of 'surplusage' has been seriously put forward, far less sustained, in any authoritative judicial verdict.

Since the inauguration of the constitution in January 1950, a number of cases, bearing on the interpretations of these clauses, have been decided by the Supreme Court either on appeal, or in the exercise of its special writ jurisdiction, for instance. *Chiranjib Lal v. the Union of India*; *the State of Bombay v. Balsara*; *Ranjilal v. Income Tax Officer, Mohindar Garh*; *the State of West Bengal v. A. A. Sarkar*; *Kathi Raning Rawat v. The State of Saurashtra*; and *Kedarnath Bajoria v. The State of West Bengal*. It is difficult to say definitely whether the parties concerned placed arguments before the Court in support of any interpretation of the 'equality before the law' clause, but it is clear that the judges practically ignored that clause and, instead, showed a good deal of learning by exhaustive quotations from the decisions of the American Supreme Court throwing light on the meaning of the 'equal protection of the laws' clause.

There is, of course, an incidental reference in one of our Supreme Court judgments where it is conceded that the rule 'equality before the law' is an "established maxim of the English constitution". The reference is incidental, and no more than incidental. And yet one should have expected from the Supreme Court a clear enunciation of what, according to them, constitutes the principles involved in that established English maxim which has found place in the fundamental law of our country. Perhaps the reason for this lacuna in our judicial interpretation is that English judges themselves are in confusion.

If, for example, the rule is construed to mean literally what Dicey had in mind or what Hewart interpreted it to mean, then, on the one hand, the entire scheme of social security comes to naught and, on the other hand, the ruling class is prevented from tackling the capitalist crisis through concentration of coercive executive power by various administrative measures in the garb of the sovereignty of Parliament or under the cloak of delegated legislation. At one end, there is continuous and persistent pressure from the labour rank and file to whom concessions must be made, however grudgingly or tardily, to avoid open conflict leading, maybe, to violent convulsions. At the other end, the increasing tempo of the capitalist crisis leaves no alternative to the beneficiaries and custodians of vested interests but to throw off the formal democratic mask and to launch a frontal attack against any challenge to the *status quo* and the existing social order in flagrant violation of the 'established' rule of 'equality before the law'.

The result is a compromise which is reflected in judicial pronouncements no less than in the laws and orders. This judicial posture in England, which is by no means stable and free from confusion, has offered no guidance or help to our Supreme Court judges. And understandably for that reason, attention is concentrated in our country on 'the equal protection of the laws' clause which, across the Atlantic, has produced a wealth of case-law literature over a long period of time.

Relying mainly on the American decisions our Supreme Court has enunciated certain principles. These are (1) that 'the equal protection' does not mean that every law must have universal application for all persons who are not, by nature, attainment or circumstances, in the same position; (2) that the varying needs of different classes of persons often require separate treatment; (3) that the guarantee as to 'the equal protection of the laws' does not take away from the State the power to classify persons for legitimate purposes; (4) that while reasonable classification is permissible, it must not be arbitrary and without any substantial basis; (5) that the vesting of absolute and unfettered discretion in the executive with nothing in the law to guide or control its action in the matter of classification is arbitrary and hence unconstitutional; (6) that 'equality' means equality among members of a well-defined class, and not necessarily equality among different well-defined classes or persons; and (7) that the presumption is always in favour of the validity of an enactment, though rebuttable on the ground that there is no classification, or that the classification made is elusive or arbitrary.

In concrete terms what is meant is this: Suppose a law is enacted requiring, as in West Bengal, "a special court to try such offences or class of offences or cases or class of cases as the State Government may, by general or special order, direct". Such a law attracts the operation of the 'equal protection of the laws' clause, and is unconstitutional. Nor perhaps is a law saved if it simply directs certain specified offences to be tried by a special court. A law seems to be in order if it lays down the criterion or the basis on which the classification of the offences is made and specifies the offences, in accordance therewith, to be tried by a special court. Some confusion has been caused by the Supreme Court's majority ruling that *Bajoria's case* falls on the same side of the line as the ruling in the *Saurashtra case* where *Anwar Ali's case* was distinguished from, and that whether an enactment providing for special procedure for the trial of certain offences is or is not violative of article 14 of the

constitution must be determined in each case, as it arises, and not by the application of a general rule to all cases. A practical assessment of the operation of the law in particular circumstances is, in their view, necessary.

In *Anwar Ali's case* the relevant section of the West Bengal enactment was declared unconstitutional because the judges brushed aside the provision for, "speedier trial of certain offences" as too indefinite and vague to constitute a reasonable basis for classification. The judgment in that case proceeded on the view that no standard was laid down or no principle or policy was disclosed in the impugned legislation to guide the exercise of discretion by the Government in selecting a 'case' for reference to the special court for trial under the special procedure provided in the Act. Consequently, according to the majority of the judges, the main reasoning in that case is hardly applicable to *Bajoria's case* which arose out of a statute based on a classification which, in the context of the abnormal post-war economic and social conditions, is readily intelligible and obviously calculated to subserve the legislative purpose. The principle is that if the impugned legislation indicates the policy which inspired it and the object which it seeks to attain, the mere fact that the legislation does not itself make a complete and precise classification of the persons or things to which it is to be applied, but leaves the selective application of the law to be made by the Government in accordance with the standard indicated or the underlying policy and object disclosed, is not a sufficient ground for declaring it arbitrary and repugnant to article 14.

The majority view has been dissented from by Bose, J. In so far as the Act makes provision for setting up of special courts and of special judges, and in so far as it selects classes of offences which can be tried by them, it is, according to him, good law. It is bad law where it empowers the Government to pick out cases from among the specified classes and to send them to special courts and thus discriminate between man and man in the same class. The legislature cannot select case A and case B

and case C and accused X and Y and Z and send them to the special courts for trial, leaving others, similarly placed in the same class, for trial by the ordinary courts of the land. And, adds the judge, what the legislature itself could not do cannot be done by a delegated authority. There is, I contend, considerable force in the reasoning of Bose, J., having regard to the special position accorded by the constitution to what are described as the fundamental rights. Both the *Sourashtra case* and *Bajoria's case* appear to mark a retreat from the principle laid down in *Anwar Ali's case*. If the propositions enunciated in the former two cases have settled the issue, then it is obvious that very little remains of the 'equal protection of the laws' clause of the constitution, except perhaps the grin of the Cheshire cat.

Now, if the Supreme Court are ever called upon to interpret the phrase 'equality before the law', they may, I suggest, have to reject it, of course without reason, as 'surplusage', or to give it the same meaning as they have given to the 'equal protection of the laws' clause, following the decisions of the American Supreme Court. Indeed they have in effect done so in the several cases already mentioned. The reason is this: You cannot talk of 'equality before the law', in the sense in which Dicey used it or on the authority of Hewart's interpretation, when you give to the President, Governors and Rajpramukhas, as you have done under article 361, immunities which do not apply to others. You deny 'equality before the law' in that sense when you give the Rulers of Indian States, as under article 362, special rights and privileges. You do not adhere to the rule of 'equality before the law' exactly in that sense, so long as you do not withdraw the special protection given under section 197 Cr.P.C. to the judges, magistrates and other public servants; and under section 197A Cr.P.C., to the Rulers of former Indian States. I need not multiply examples.

Perhaps the Supreme Court may not countenance the 'surplusage' theory. Nevertheless, they may say "equality, yes; but equality, subject to reservations", that is, equality

among similar persons in similar positions, not equality irrespective of rank, status and station in life. So, directly or indirectly, reliance may be placed on the general principles of construction put upon the 'equal protection of the laws' clause by the American Supreme Court. In economic theory Marshall, that famous Cambridge scholar, introduced an omnibus phrase, and stated, as a proposition of science, that "other things being equal" such and such economic phenomena would emerge. But other things in this mysterious world are rarely equal, and there is an old saying that one does not bathe in the Ganges twice. I do not know whether Marshall has given an economic twist to the legal maxim of the American Court, or whether the American Court has extracted juridical essence from Marshall's economic category. It may as well be that great minds think alike. Be that as it may, the broad conclusions reached by courts may be summed up in the following syllogism :

Major premise: The State cannot deny equality before the law or the equal protection of the laws.

Minor premise: The State denies equality before the law or the equal protection of the laws.

Conclusion: Therefore, what the State denies is not equality before the law or the equal protection of the laws.

I mean no reflection on the courts or the judges. They are not to blame. Sitting in court they cannot assume that draftsmen of constitutions and statutes are fools or knaves or both. They cannot assume that the latter did not or could not understand what they chose to put into their texts. On the contrary, they must assume that draftsmen or law-makers are knowledgeable, honest and understanding persons, having had no axe to grind, and sworn to do good to all.

These are maxims of law which we have inherited from English judges and their more enterprising trans-Atlantic successors. Called upon to reconcile irreconcilable absurdities the courts or judges find it extremely difficult, if not impossible, at times, to adjust themselves to stark

realities or to the requirements of the administration as expressed in statutes, orders and ordinances. The judges are all agreed that 'equality before the law' or 'the equal protection of the laws' cannot mean and is not intended to mean that every person shall be treated alike. But what it does precisely mean is bound to cause confusion among the judges themselves as has been demonstrated in the cases cited above. Some of them may feel that in this context equality before the law or the equal protection of the laws "in its stately righteousness", as Anatole France so aptly puts it, "forbids rich and poor alike to sleep under a bridge, to beg for alms in the street, and to steal bread", But then that is politics which, to the judges, is forbidden *mantram*.

Now, article 15 (1) says that the State shall not discriminate against any citizen on grounds *only* of religion, race, caste, sex, place of birth or any of them. Affirmatively, it means that the State may make discrimination on any other ground, for example, on grounds of language, nationality, descent, profession, calling, residence and domicile or any of them. Article 16 (2) says that no citizen shall, on grounds *only* of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against, in respect of any employment or office under the State. Domicile, language or nationality is not covered in any of these articles so that discrimination is permissible on any of these grounds. Article 16 (2), however, covers descent and residence, while these do not come within the purview of article 15 (1). This difference is bound to be the subject of legal controversy at the bar as well as in the court.

In the course of his lectures delivered before the University of Madras in March, 1952, Jennings expressed his doubt as to whether "article 14 contains anything that is not in article 15 (1)". With respect I differ from this view. The protection contemplated under article 14 is much wider than that provided for in article 15 or in article 16. As a matter of fact or of law, the provisions of the latter two articles restrict the scope of the fundamental right guaranteed under article 14, and to a certain extent expose

the limitations of the clauses relating to the 'equality before the law' and 'the equal protection of the laws'. If article 14 is construed to mean what literally it means, then articles 15 and 16 are unnecessary. On the principle, however, that the particular controls the general the judges may hold that article 14, which contains a general proposition, does not mean what it says, that is, it does not mean what it means. Indeed several decisions of the Supreme Court read like this.

Then article 16 (1) says that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. 'Equality of opportunity' begins from the elementary stage of education and indeed from birth, and not when the appointment or employment is offered. A citizen who, on account of lack of economic competence, has been denied the opportunity of receiving such education as constitutes the minimum criterion of eligibility is, in fact, denied 'equality of opportunity' in matters relating to employment or appointment. Can he go to the Supreme Court under article 32 or to the appropriate High Court under article 226 and ask for remedy when his application for employment or appointment to a high office under the State is rejected on the ground of his educational inefficiency? The formulation in article 16 (1) is not an expression of a pious platitude; it is a fundamental right guaranteed to every citizen. The phrasing of the clause is clumsy, thoughtless and confusing.

10. Freedom of Speech and Expression

I now come to the rights to freedom of speech and expression as guaranteed to every citizen under article 19 (1) (a) of the constitution. You find an analogous provision in the first amendment to the American constitution which states *inter alia* that "Congress shall make no law... abridging the freedom of speech, or of the press ..". In Britain, like many other rights of the individual, it is not a statutory right, but rests on the common law as interpreted by the courts. It means that every one is free to say, write, or publish what he pleases so long as he does not commit a

breach of the law. This right is, therefore, subject to the restrictions of laws relating to libel, slander, blasphemy, sedition and like offences. I need not waste your time and mine by quotations from the constitutional provisions in other capitalistic States. Suffice it to point out that the enumeration of such rights, almost in the same language, is a common, familiar feature of all bourgeois constitutions.

Certain observations made by the American Supreme Court in *Thornhill v. Alabama* (1940) are, however, significant. They say: "Those who won our independence had confidence in the power of free and fearless reasoning and communications of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion". What, one may ask, is 'political and economic truth'? What, one wonders, are 'noxious ideas' that require to be refuted? Presumably the 'truth' is the truth as recognised by those in power, whether in the legislature, administration or judiciary and, in the last analysis, the administration. The doctrines are 'obnoxious' because they denounce them as obnoxious. If, on crucial occasions, a conflict ensues between the 'truth' of the ruling class and the 'obnoxious ideas' of the ruled, what happens? Either the ruled are suppressed, or there is revolt. Does any State in the world, democratic or other, tolerate propagation of the doctrine of revolt? It does not and cannot. Either the rebels succeed notwithstanding the law or legalised coercion, in which case the old State yields place to the new established by them; or they are crushed, in which case the rebels become bandits, and are drastically dealt with as such by the ruling class. In the long and chequered history of social evolution one finds numerous examples of such conflicts, struggles and civil convulsions which are due to continuous class antagonisms.

Now, light has been thrown on our constitutional guarantee as to freedom of speech and expression [article 19 (1) (a)] by the Supreme Court in *Brij Bhushon v. The State of Delhi* (1950), and in *Romesh Thapper v. The State of Madras* (1950). The rules laid down in these two cases

taken together are: (1) that the liberty of the press is an essential part of the freedom of speech and expression ; (2) that the imposition of pre-censorship (sic) on a journal is a restriction on that liberty; (3) that freedom of speech and expression includes freedom of propagation of ideas which is ensured by the freedom of circulation ; (4) that freedom of speech and expression cannot be curtailed on the plea of prejudicial activity unless it tends to undermine the security of the State or to overthrow the State; and (5) that public disorder of a minor or local nature does not undermine the security of the State or tend to overthrow it.

In enunciating these rules the Supreme Court considered the law of sedition, and referred to the Federal Court's judgment in the case of *Niharendu Dutt-Majumder v. The King Emperor* (1942), where it had been held that the "acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency". They referred also to the fact that the Federal Court's interpretation of section 124A I.P.C. (sedition) had been overruled in the case of *King-Emperor v. Sadasiv Narayan Valarao* (1947) by the Privy Council. In effect the Privy Council had reaffirmed the decision in *Tilak's case* (1897) by stating that "the offence consisted in exciting or attempting to excite in others certain bad feelings towards the Government, and not in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small". Without going into the merits of the one or the other judgment, the Supreme Court relied upon the deletion of the word 'sedition' from the draft constitution in holding that "the criticism of the Government exciting disaffection or bad feelings towards it, is not to be regarded as a justifying ground for restricting the freedom of expression, and of the press, unless it is such as to undermine the security of, or to tend to overthrow, the State".

Immediately after these decisions legislation, by way of amendment of article 19(2), was enacted in 1951, with retrospective effect at the instance of the Government.

Consequently, reasonable restrictions imposed by competent legislation on the exercise of the right to freedom of speech and expression in the interests of 'friendly relations with foreign States and of 'public order' are valid and constitutional. Thus the ruling of the Supreme Court, in so far as it sought to draw a line of distinction between 'public disorder' and the 'undermining of the security of the State or the overthrow of the State', has been nullified from the point of view of the exercise of freedom of speech and expression.

That is not all. By the addition of the phrase "an incitement to an offence" in the amendment the scope of the restrictions has been incalculably widened so that, in the exercise of his freedom of speech and expression, a citizen cannot claim legal immunity from liability in respect of *any* offence. The pervasive character of the restrictions is easily gathered from the meaning of the word 'offence', which denotes a thing made punishable under the Penal Code generally and, in particular instances, under any special or local law. It comes to this, therefore, that the freedom guaranteed under article 19(1)(a) is, to all intents and purposes, superseded by the existing British Indian punitive laws as well as by laws which may have already been enacted by Parliament and the legislatures of the States. Of course, it is open to the Supreme Court and the High Courts to investigate and pronounce, in particular cases, upon the 'reasonableness' of the restrictions. Even then the scope of judicial interpretation in this regard is extremely restricted.

You have the law of sedition defined in section 124A I.P.C., although the term 'sedition', put in as a marginal heading, does not find place in the text. If by your speech or writing you attempt to bring the Government into hatred or contempt or to excite disaffection towards them, you commit sedition. You may then be punished with transportation for life or for any shorter term, to which fine may be added. Without the amendments the Supreme Court construed Article 19(1) (a)(2) as having, in effect, eliminated 'sedition' from the statute book except where an

attack against the Government undermined the security of the State or led to its overthrow. With the amendments the Privy Council's ruling in *Sadashiv's case* seems to have been virtually restored.

Take, again, section 153A I.P.C. If you, by speech or writing, attempt to promote feelings of enmity or hatred between different classes of the citizens of India, you commit the offence of what is popularly known as class hatred. You may for this offence be convicted and punished with imprisonment for ten years or with fine or with both. Originally devised by the British Government in India to protect British European subjects, it came to be frequently used later on for Muslims against Hindus and for Hindus against Muslims. One will not be surprised if, overwhelmed with crisis, the ruling class begin now or in future to employ it for the suppression of peasants and labourers on the pretext of combating class hatred or enmity. The wording of article 19(1)(a)(2), as interpreted by the Supreme Court in the aforesaid cases, left little doubt that this provision of the Penal Code, too, had been reduced to a nullity. With the amendments the entire Penal Code and special or local laws are at large, and it appears that our fundamental right under this heading is neither fundamental nor right.

11. The Liberty of Person and Preventive Detention

This takes us to the liberty of person or personal freedom. English jurists, judges and commentators with a sense of pride have waxed eloquent over this right of the individual citizen, which is so simple and obvious to them. It is true that up till now neither in Britain nor in the USA the rule, that no person shall be detained without trial, has been departed from generally in peace time. If there is unlawful detention, there may be access to the courts who issue the writ of *habeas corpus*. When a coloured slave was held in irons on board a ship lying in the Thames and bound for Jamaica in 1771, Lord Mansfield declared his detention unlawful, and set him at liberty. In 1949 Gerhardt Eisler was taken forcibly from a Polish ship, and Sir Lawrence

Dunne ordered him to 'go free'. The principle followed in Britain and in the USA is that a person can be sent to prison by conviction by a court of law for offences found to have been committed by him. But in time of peace he cannot be detained by the executive simply because they think that he may commit offences today, tomorrow or at any time in future. Punitive detention, in other words, is valid in peace time as well as during war, whereas preventive detention is illegal in peace time. In western Europe, however, the procedure is different. If a person is detained, he cannot directly ask for a judicial remedy. He may lodge complaint with a police officer. If the police officer refuses to do his duty, he may be charged with an offence. That is all. In 1946, a British soldier was arrested in Belgium on a charge of murder. For more than a year he was kept in custody without a trial.

In India the constitution [article 19(1)(d)(e)] guarantees to every citizen the right to move freely throughout the country, and to reside and settle in any part thereof. Article 21 provides that no person shall be deprived of his life and personal liberty, except according to procedure established by law. There is provision in article 22 for preventive detention, subject to certain limitations. All this is confusing. That this is so has been demonstrated by differences of opinion among the judges of the Supreme Court themselves in the case of *A. K. Gopalan v. The State of Madras* (1950). The ruling given in the majority judgment is significant. Well, you are free to exercise the rights under article 19, if at all you are free. If you are sent to prison on conviction by courts or by a fiat of the executive, article 19 ceases to exist for you. It is dead, so far as you are concerned. It is open to the executive to take away your personal liberty or even life, no matter whether your country is at war with some other country or countries, or whether your country is pursuing diligently and with manly vigour the noble ideals of peace after Gandhiji or in conformity with the 'democratic' pattern. The only limitation is that in doing so the

executive must act in accordance with the procedure established by law.

And what is law? Law here does not mean those principles of natural justice which the American Supreme Court have construed as explaining the 'due process of law' a phrase incorporated in the fifth Amendment to the American constitution, offering guarantees to every person as to his life, liberty and property. Law here means law as enacted by Parliament or the legislatures of States. It means *lex* which is State-made, and not *jus* in the abstract sense of the principles of natural justice. In the USA the Supreme Court have the right of 'judicial' review because, on the doctrine of separation of powers, all judicial power is vested in them as under article III (section 1). They can apply the test of *jus* to any kind of legislation or executive action and, in the light of that test, pronounce upon its validity or otherwise. Our Supreme Court, by contrast, have only the right of judicial interpretation which excludes examination of the principles of natural justice or of policy involved in legislation. They must go by the language of the constitution, and when the text is explicit they have nothing more to do than to see if the law is or is not in conflict with the text. If it is in conflict, it goes. If it is not, the question of the application of the principles of natural justice does not arise at all. In the latter case law is law notwithstanding its illegality by reason of its repugnance to justice, equity and good conscience.

So it means that you are free so long as you are free. You commit an offence, and on judicial verdict you go to jail. That perhaps is simple. You commit no offence, but if the executive think that you may commit an offence in future, having regard to your past, including your anti-Government activities under the leadership of Deshbandhu Chittaranjan Das or even of Mahatma Gandhi, you may be clapped in prison without any reference to courts. You cannot then ask for a writ of *habeas corpus*, and the judiciary is helpless.

You are, of course, entitled to know on what grounds you are detained, and to make representation against the

order of detention. But the detaining authority may refuse, in public interest, to disclose facts on which the grounds of your detention are presumably based. All that is required is that the action of the executive in this behalf must be in accordance with 'the procedure established by law', a term which is borrowed from the Japanese constitution. We are a people with receptive minds, and we believe in democratic tradition. We try to learn, to know and to absorb. So if England comes handy, England is our teacher. If America, in her constructive generosity, offers us bounteous gifts for the furtherance of the Gandhian aims, we clasp them with alacrity, enthusiasm and gratitude. If Japan, virtually under American occupation, shows us a way out, she is our path-finder. Nevertheless, we are a discriminating people. We have the shrewd sense to discriminate between good and evil, yes, between 'democratic' good and 'totalitarian' evil !

But sometimes even learned judges with dependable antecedents and excellent references allow themselves to be swept off their feet by the little contradictions between theory and practice, between what should be and what is. In the course of recorded judgments they go out of their way to make statements which are embarrassing to the executive, sworn to do right to all manner of people, without fear or favour, affection or, ill-will. So a Supreme Court judge comes forward and says about preventive detention that no offence is proved, that no charge is formulated, that the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. He says that detention in such form is unknown in America, that it is resorted to in England only during war time, that no country in the world, that he is aware of, has made this an integral part of its constitution as has been done in India. This, he says, is undoubtedly unfortunate. Another judge, sitting in Court, says that our constitution has accepted preventive detention as the subject-matter of peace-time legislation as distinct from emergency legislation, that it is a novel feature to

provide for preventive detention in the constitution, that there is no such provision in the constitution of any other country that he knows of. Preventive detention law, he says, is odious to many of us at all times.

But what the judges have not said is that it is not odious to those whose business it is to govern as it was not odious to their British predecessors who employed this weapon at all times, in peace time as well as in war time, during normalcy no less than during emergency, for the safety of their colonial Empire, and in its interests. We make no break with the past, maybe it was a hideous and horrible past. Continuity is the law of life and progress, which we scrupulously follow as the builders of the India of tomorrow to nourish and enrich our Gandhian inheritance.

12. Private Property as a Fundamental Right

That rule of continuity is preserved in so many of our constitutional provisions, especially in article 31 which relates to private property. It reproduces section 299 of the Government of India Act, 1935, with an additional provision which is intended to extend its scope in the interest of private property. For instance, the British Indian protection applied to 'acquisition' only, whereas the sovereign republican protection extends to 'acquisition' as well as to 'taking possession'. This is a change for the worse, which, curiously enough, has not been taken due notice of in the relevant judgments of the Supreme Court. A State, as understood in terms of Part III of the constitution, cannot, as a principle of law, *acquire* or *take possession* of private property except under certain restrictions. The restrictions are; (i) that the acquisition or taking possession must be for a public purpose; (ii) that the acquisition or taking possession must be under a law as distinguished from executive action not authorised by or under law; and (iii) that the law must provide for compensation for the property acquired or taken possession of.

That, however, is not a new principle or law or ethics either in this country or in any other country, where

private property is the basis of social relations.' It is recognised almost universally that the State has power to acquire or take possession of property. It is recognised in slave States, feudal States, capitalist States, democratic States or socialist States. In this regard there is no difference. This power is inherent in the principle underlying what is technically known as *Eminent Domain*. Up to this point there is similarity, and here it ends. British and American jurists and judges, on the basis of their knowledge of States and their laws, have discovered in *Eminent Domain* two other principles. It is founded, first, on the superior claims of the whole community over an individual citizen. It is applicable, in the second place, only to those cases (a) where private property is wanted for public use, or demanded by the public welfare, and (b) where compensation is provided for. All these principles are embodied in the Indian constitution with certain exceptions which are specified.

Following the Anglo-American law and tradition, our jurists and judges, too, cite Cooley and Nichols as authorities. They rely mostly upon British and American decisions. The right of the State to take springs from the necessity of the State, whereas, we are told, the obligation to make compensation flows from a different source, namely, the natural rights of the individual. Thus there is a right to take, and attached to that right as an incident, there is an obligation to pay. The right to take is, however, not an unfettered right; it must be limited to a public purpose. All these are basic maxims of English, American and all other laws save the laws of socialist States and the people's democracies.

The latter category of States do not accept the obligation to pay. They do not recognise that private owners possess any natural rights in respect of property as against the claims of the community and their fellow men. They maintain that the sacrifice involved in the payment of compensation is the sacrifice of all the individual members of the community minus the private-owners. In that view of the matter they assert that the sacrifice

should not and must not be demanded of the community for the reason, amongst others, that the exercise of the sovereign power of the State in this behalf is conducive to the welfare of all. These propositions are, of course, obnoxious to the maxims of English or American law no less than to the doctrines enunciated by famous English or American jurists.

The framers of our constitution have adopted the English or American way, aye, the 'democratic' way of the capitalist State, not the socialist or the 'totalitarian' way of the Chinese or East European pattern, far less the Soviet way. Naturally enough, our jurists and judges quote extensively from English and American decisions or the maxims laid down by English and American commentators in support of the views they are pleased to air. Sometimes our jurists and judges differ from one another, but not on fundamental questions. Within the agreed basic principles some search for truths, the moral categories or the eternal verities in the sacred lore of the 'other worldly' commentators, while others seek to find light in the ever-expanding case-law replete with wise saws and ancient, not modern, instances. Here, again, no reflection on the jurists and judges is intended. We all suffer from the tradition-complex. We are born to a system; we imbibe, by birth and upbringing and education, a certain code of values. It is extremely difficult to overcome it, to rise superior to it. It reminds one of the old story of the self-complacent frog in a well. To the frog this vast world of mighty rivers and fathomless seas was nothing compared to its little familiar well. We are tied down, as it were, by the weight of our learning, and our learning is derived from the legal or constitutional literature that comes into our hands so easily and by the law of motion of our society.

So we learn from the fifth amendment to the American constitution that no person shall be deprived of his property without due process of law; from the French constitution that property is 'a sacred and inviolable right' and cannot be taken away except 'on condition of just and fair indemnity'; from the Japanese constitution that 'the right to

own property is inviolable' ; from the English legal maxim that every invasion of private property 'is a trespass'. All this sanctity and 'inviolability' in the realm of social science bears a striking family likeness to the myth of the eternal chromosome substance propagated by Weismann, Mendel and Morgan in the field of genetics. You cannot, they say, touch the invariable hereditary substance which directs the mortal body, but which is independent of the qualitative features attending its development. It is a substance which is constant and does not itself develop and, at the same time, determines the development of the mortal body. Almost in the same fashion, according to jurists and judges, the substance of private right, its chromosome essence, as it were, is sacrosanct and inviolable, and does not itself change but, at the same time, determines social change.

In agronomy and biology Michurin and Lysenko have shaken the foundations of the idealistic and mythical conception in genetics associated with Weismann, Mendel and Morgan, paving the way to a mighty revolution in the creative human endeavour. In social science, too, the myth of the immortal and unchanging substance of the private right in property has been effectively exposed since 1917, thereby bringing into full play the irrepressible energy and boundless power of mankind in no inconsiderable portions of the earth's surface.

The scope of the constitutional provisions relating to private property in our country has been dealt with by the Supreme Court in the case of *The State of Bihar v. Maharajadhiraja Sir Kameswar Singh of Darbhanga* (1952), although the issues involved in the case were directly concerned with certain Land Reforms legislation enacted by the State legislature. Here, too, there are several differing judgments. On the main issues the judges are agreed. For one thing, the obligation for payment of just compensation is a necessary incident of the power of compulsory acquisition of property under the doctrine of the English common law as well as under the Continental doctrine of *Eminent Domain* subsequently adopted in the USA. The constitution requires Parliament or a State legislature, when making a law for

compulsory acquisition or taking possession of private property, to provide for compensation and, to that end, either to fix the amount of compensation or to specify the principles on which, and the manner in which, the compensation is to be determined and given.

For another, the acquisition or taking possession must be for a public purpose. There is no power implicit in *Eminent Domain*, on the part of the State to acquire or take possession of private property for the purpose of giving it to private persons. Reference is made in support of this contention to Willoughby who writes : "As between individuals, no necessity, however great, no emergency, however imminent, no improvement, however valuable, no refusal, however unneighbourly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require a man to part with an inch of his estate".

It is conceded, however, that it is not necessary that the nature of the purpose must be stated expressly in the statute; it is enough if the tenor and intendment of the Act make it clear that the property was being acquired or taken possession of for the purposes of the State or for the purposes of the public, and that the intention was to benefit the community at large. The legislature is the best judge of what is good for the community by whose suffrage it comes into existence.

This brings one to the third point as to which all the judges have not taken the same view. The point is about the meaning of property as contemplated under the article in question. The majority of the judges have held that whereas the acquisition of 'estates' fulfils the requirements of a public purpose, the acquisition of arrears of rent does not. For authority they quote Cooley who says : "Taking money under the right of *Eminent Domain*, when it must be compensated in money afterwards, is nothing more or less than a forced loan. Money or that which in ordinary use passes as such and which the Government may reach by taxation, and also rights in action which can only be available when made to produce money, cannot be taken

under this power". Cooley has known of no instance, quite appropriately enough, in which private property has been taken "for the mere purpose of raising a revenue by sale or otherwise". The exercise of such 'power, according to him, is utterly destructive of the individual right.

One of the judges, who subscribes to the majority view, observes that money as such and also rights in action are ordinarily excluded from this power of acquisition by American jurists. He points out that money in the hands of a citizen can be reached by taxation, that it can be confiscated as a penalty under judicial order. And then he goes on to add that there may be cases where the State seizes or confiscates money belonging to, or in the hands of, a citizen on the ground that such fund may be used for unlawful purposes to the detriment of the interest of the community.

What do these learned elaborations, presumably made on the authority of American jurists,—and we have discovered a new world of values—in effect mean? The answer is simple. The State may raise money by taxing the poor man's scanty cloth, the hungry man's daily diminishing food, the rack-rented peasant's homely *hookka*, the exploited worker's little *bidi* and the inquisitive child's natural thirst for knowledge. It can also raise money, in certain circumstances, by seizing or confiscating the fund used for the propagation of political, economic or social doctrines. But it cannot, in any event, touch money or actionable claims or choses in action, even though they may be used for sustaining a leisured, lazy and lordly class, or for cruel and merciless exploitation of human labour, skill and dignity. And all this precious wisdom we borrow from Cooley, Nichols, Willis, Willoughby and a host of American or British jurists!

Another judge, representing the minority view, tries, though in apologetic terms, to repel the authority of Willis, not of course on merits as such, but as a sort of oath against oath. If Willis, he argues, is an authority, no less an authority is Nichols. Willis, he points out, relies on earlier American decisions, whereas Nichols takes his cue

from comparatively modern American decisions. And where there is conflict, the new must supersede the old to the extent of conflict. The modern American view is that the right of *Eminent Domain* extends to choses in action, that is, property one has a right to sue for. Arrears of rent are not at all money in the tilt of the landlord, but constitute a debt due to him by the tenants. It is, therefore, nothing but an actionable claim against the tenants, which is a species of assignable property. According to the minority view, it can be acquired by the State as a 'species' of property.

But the judges, it must be noted, have no differences of opinion as regards the point that if property, whatever its species, is acquired, the State is under obligation, subject to certain exceptions, to pay compensation. Even where exceptions have been made, as under articles 31(4), 31A and 31B, it does not follow that the State's obligation to pay has been repudiated, or that the principle of confiscation of private property has been accepted. As the Supreme Court put it, the Indian constitution has raised the obligation to pay compensation for the compulsory acquisition of property to the status of a fundamental right, and, as a rule, a law that does not make provision for payment of compensation is void and unconstitutional. They should have added that the provision for compensation must be made not only for 'acquisition', but also in respect of 'taking possession', a safeguard for the protection of private property, which even the framers of the Government of India Act, 1935, dared not introduce as part of the fundamental law of the land.

It is true that the rule of compensation does not apply when property is acquired, taken possession of, or even destroyed for the promotion of public health or the prevention of danger to life or property. Article 31(5)(ii) recognises, in express terms, the American doctrine of 'police powers'. The power under the *Eminent Domain* is exercised for the benefit of the community, while the assumption is that private property may be affected by the exercise of the 'police powers' for protecting the community from evils.

13. The Protection Extends to All Irrespective of Nationality or Race

The protection guaranteed as a fundamental right under our constitution, mind you, is not restricted to Indian owners of private property; it extends to all property holders, no matter whether they are British, Canadian, Australian, American, or of any other nationality, or of domicile. It means that apart from guarding private Indian interests, if the State considers it desirable or necessary to acquire or take possession of British or any foreign investments in this Country, it is not within its power to do so without providing by law for compensation. That means, again, that the people of India must find the money. In other words, all they are entitled to do is to buy at fair and reasonable prices these protected and entrenched non-Indian interests. The exploited, that is, must not only allow themselves to be exploited, but pay compensation for any impairment of the exploiters' fundamental right to exploit the human material no less than the country's material resources.

I am not advocating racial discrimination as such. What I contend instead is that the recognition of the title to compensation in this context as a fundamental right amounts to putting a premium on the *status quo*, and imposing a brake upon the normal operation of the forces of production. I contend further that so long as there are different States and different nationalities in the world, national interests as well as national safety may demand in special cases differential treatment as between nationals and non-nationals, as between citizens and non-citizens. In our time the so-called nineteenth century distinction between political rights and civil rights, understood in a broad sense, is extremely thin indeed, for economic penetration is no less deadly than political interference, as is demonstrated by the new and modern shift in the tactics and strategy of imperialism in the midst of a deepening crisis. The visible symbols of the political sovereignty may be seriously undermined, if not completely destroyed, by the invisible insinuations of the transactions at the counter, in stocks

and shares and in money and exchange, or by the collaborationist norms of joint economic enterprises and welfare community projects.

14. The Judicial Remedy as a Fundamental Right

Now I come to the judicial processes for the enforcement of fundamental rights. These may issue from the Supreme Court under article 32. The High Courts have also power under article 226 to apply them within their respective jurisdictions for the enforcement of fundamental rights as well as for any other purpose. The right of access to the Supreme Court is a fundamental right, whereas the right of access to a High Court is certainly a right, but not a fundamental right. What, then, one may ask, is the difference? One of the points of difference has been clearly explained by the Supreme Court in the case of *Ramesh Thapper v. The State of Madras*, already cited. The Advocate-general of Madras, appearing on behalf of the State, objected to the petitioner going to the Supreme Court directly, for relief. He contended that, as a matter of orderly procedure, the petitioner should, in the first instance, seek relief under article 226 from the relevant High Court. He cited criminal revision petitions under section 435 Cr.P.C., and applications for transfer under section 24 C.P.C. as instances where the usual practice was for the party to go to a lower court for relief before approaching the High Court. He pointed out also that the American Supreme Court had held, in several cases, that they would not consider a matter unless they were satisfied that the remedies open to the party at lower levels had been fully exhausted.

Our Supreme Court have rejected all these contentions, observing that these instances were not relevant. Their power to issue writs is not analogous to that conferred upon the High Courts. It is not part of their ordinary jurisdiction. The remedy made available to a party under article 32 is a 'guaranteed' remedy and constitutes a 'fundamental right'. The Supreme Court cannot, consistently with the responsibility cast upon them

by the constitution, reject the petition and send the party away on the ground merely that the High Court's jurisdiction in this regard was not earlier availed of by him. Nothing like this guaranteed right has found place in the American constitution and, consequently, in the opinion of our Supreme Court, the American rulings have no bearing on the question.

This leads to another very important point upon which the Supreme Court have as yet thrown no light. The point is this. Suppose in a given case the application under article 226 for enforcement of a fundamental right has been rejected by the High Court concerned. What happens? Of course, the aggrieved petitioner may go, on appeal, to the Supreme Court on certificate or on special leave. But can he seek relief from the Supreme Court under article 32, by way of exercise of his fundamental right precisely on the same facts and grounds? While referring to this point in the case of *Aswini Kumar Ghose v. Arabinda Bose* (1952) the Supreme Court, for understandable reasons, have refrained from expressing an opinion. I contend, however, for what it may be worth, that he can. My grounds for this view are two. First, if the remedy under article 32 is a fundamental right, as it admittedly is, then that right is not destroyed by the fact of the petition having been rejected by the High Court. It is a right apart from, and independent of, the judicial processes available at the High Court. In the second place, article 226(2) itself clearly says that the power, conferred on a High Court in this behalf, shall not be in derogation of the power of the Supreme Court under article 32.

In the event of an application under article 226 being rejected by the High Court the petitioner, in my opinion, has three alternative courses open to him for relief. First, he may ask for and get a certificate from the High Court stating that the case involves interpretation of the constitution. With that certificate he goes on appeal to the Supreme Court. Secondly, if the High Court refuses to give a certificate, he may move the Supreme Court for special leave to appeal, and the Supreme Court may or may

not grant it. Thirdly, he may put the Supreme Court in seisin of the matter under article 32, in the exercise of his fundamental right.

These provisions for judicial remedies against any violation of the fundamental rights have led some commentators to pay eloquent tributes to the wisdom and foresight of the framers of our constitution. But for these provisions, in their opinion, declarations of fundamental rights would be useless, as was proved in Germany in connection with the Weimar constitution. In a sense, they are right, but, in ultimate analysis, respect for rights is not ensured by judicial remedies, by constitutional provisions, or by any machinery of adjudication. Rights and their application to concrete cases are determined, controlled and regulated by apparently imperceptible factors, such as the pressure of public consciousness set against the organised resistance of the possessing or owning class and of their agents in seats of authority.

In our country constitutional remedies may be suspended (article 359) during a Proclamation of Emergency, (article 352) and what the Emergency is must depend upon the judgment of the President, which, to all intents and purposes, is the Central Executive's angle of approach to a given situation. They may also be completely withdrawn by amendment of the relevant provisions (article 368) ; and here, too, the Central Executive may by threat, judicious distribution of patronage and other processes, force the requisite majority in either House of Parliament and in the State legislatures to accord their sanction to what are, on the face of it, preposterous proposals. Such developments are not unlikely in conditions of instability due to economic crisis, particularly in countries, where the tradition of parliamentary government, built over a century or more, of comparative peace and security, is yet to grow, or may not grow at all. Again, while a Proclamation of Emergency is in operation, nothing in article 19 shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in Part III of the constitution, be competent to make or take

(article 358). Thus the rights other than those guaranteed under article 19 and the constitutional remedies for the enforcement thereof are not affected by a Proclamation of Emergency.

Jennings has raised an interesting point in this connection. He says that a legislative enactment which is void under Part III is presumably void even while a Proclamation of Emergency is in force, with the exceptions already indicated. A person who wishes to challenge the validity of the legislation in question does not need a constitutional remedy. Suppose an attempt is made by legislation or administrative action to deprive him of his personal liberty without recourse to procedure established by law. He may then ignore the legislation and resist any attempt to enforce it. If he is arrested for the breach of the law he cannot, during a Proclamation of Emergency, seek the protection of the Supreme Court under article 32 or of the relevant State High Court under article 226 ; but he cannot be convicted of an offence because article 20, which remains in force, provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence. The impugned legislation is no law.

Besides, article 22 says that every person, who is arrested and detained in custody, shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest and that no person shall be detained in custody beyond the said period without the authority of a magistrate. The magistrate will set the arrested person free on the ground that he has been arrested for the breach of an enactment which is no law. Thus, as Jennings argues, constitutional questions will be decided by magistrates under article 22. Moreover, if the person suffers damage through the action of a public authority under an enactment which is invalid, he has a cause of action against that authority despite the suspension of the constitutional remedies.

There are snags in this argument. The first, which Jennings himself has taken into account, is that the arrested

person may be kept in preventive detention thereby depriving him of any judicial remedy, constitutional or other. English judges, it is true, have consistently and without hesitation expressed the view that a power conferred for security reasons should not be used for other purposes. The police in the United Kingdom consider it far too risky to abuse or misuse their power of arrest. In our country, on the other hand, the tradition left by the British bureaucracy is entirely different, and the so-called National Governments in India no less than in Pakistan have been following that tradition since their assumption of power in 1947. There are hundreds of cases where persons appear to have been kept in detention for other than security reasons. The judicial processes are not available to them because the courts are not competent to go into the validity of the procedure established by the law.

The second snag in Jennings's argument, which he has missed, is that if the constitutional validity of an enactment is canvassed before a magistrate the appropriate High Court may withdraw the case and itself dispose of it (article 228). In the case of preventive detention the magistrate does not come into the picture at all. In a case, pending before a magistrate, where a substantial question of law as to the interpretation of the constitution is involved the determining authority is not the magistrate. Therefore, Jennings is not on safe ground when he asserts that while a Proclamation of Emergency is in force constitutional issues will be decided by magistrates under article 22. What happens in such an event is that the judicial remedy through the writ process is suspended. It does not mean, however, that all judicial processes are barred.

I agree with Jennings that Part III of our constitution is based on no consistent philosophy. It is a curious mixture of contradictory patterns of values corresponding, as it apparently does, to the Government of India's social category of mixed economy. It is bound to produce a vast and complicated body of case law. Where, as in the present instance, Fundamental Rights' are normally to be enforced through tedious and vexatious litigation the

so-called constitutional guarantees are neither fundamental nor rights, so far as the common folk are concerned. To them litigation is, for obvious reasons, an instrument of oppression.

In the USA there is no constitutional provision for judicial proceedings such as we have in our country. These have, however, been authorised by statutes. But, as has been indicated above, the American Supreme Court, unlike its Indian counterpart, does not intervene except on appeal. In Britain what they call 'high prerogative writs'-a term which, like the term 'subject', is wrongly used sometimes even by our judges-were issued by competent courts not because an Act of Parliament had so willed, but, because such judicial processes were held to be of the essence of the common law tradition.

15. Meanings of the Judicial Processes

Now, I should explain, as briefly as I can, the meanings of the writs specifically mentioned in our constitution. They are :

(1) *Habeas Corpus* :

It is the remedy of a person deprived of his personal liberty. The writ is addressed to the custodian of the prisoner, commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, and to do, submit to, and receive what the judge or court shall consider in that behalf;

(2) *Mandamus* :

It is issued to compel the performance of a duty, and is addressed to the person who is subject to the duty. It applies generally where there is a legal right but no other specific remedy, especially, if the obligation arises out of the official status of the respondent and is, therefore, of a public character;

(3) *Prohibition* :

It is issued to restrain an inferior court within the limits of its jurisdiction and to prevent it from exceeding those limits. It may be absolute. It may operate until a particular act is done, and is then discharged. It may

extend only to that part of the proceeding which is in excess of jurisdiction. The rest of the proceeding is allowed to continue;

(4) *Quo Warranto* :

It is brought, with the leave of the court, against any person, who claims or usurps any office, franchise or liberty, to enquire by what authority he supports his claim; and

(5) *Certiorari* :

It is issued to an inferior court in either civil or criminal proceedings to remove a case and transfer it to a superior court in order that the parties may have a better or speedier trial. The writ is also used to bring up, for the purpose of being quashed, orders, alleged to be erroneous, of courts of summary jurisdiction.

16. Fundamental Rights in USSR

It will, I assume, not be out of place to examine in this connection some of the salient features of the fundamental rights as guaranteed in the constitution of the USSR, by way of contrast with the 'democratic' norm. Where the actual difference lies has, of course, been earlier indicated in a general way. No constitution in the world can be correctly assessed except against the background of the social relations upon which it rests. In the countries including our own, some of whose laws and constitutional provisions I have already discussed, private property and class antagonism constitute the foundation of the social order, whereas in the USSR the landlord class, the *kulak* class and the capitalist class have been eliminated, and the power has passed into the hands of the workers and peasants. There is no private property in the USSR, save in a restricted sense, and there is no class antagonism, because what causes it has been completely removed. Not that there were in any phase no economic contradictions between the peasantry and the working class or between them on the one hand, and the intelligentsia on the other. But the character of these contradictions differs from that of the antithesis under capitalism between

town and country, between industry and agriculture. This latter is based on the exploitation of the agricultural sector by the industrial sector due to the peculiar character of the development of industry, trade and credit by the industrialists and their agents and henchmen. It is an antagonism of interests.

As a result of the elimination in the USSR of exploiting classes and the so-called sanctity of their ownership of the instruments and means of production, the dividing lines between the working class and the peasantry have virtually disappeared because they are both interested in the consolidation of the socialist system, in the rapid transition from socialism to communism. The intelligentsia in the USSR are by no means a class; they constitute a social stratum drawn from the peasantry and the working class alike. The basis of antagonism between mental and physical labour, under private ownership of the instruments and means of production, is the exploitation of physical workers by mental workers. That basis has been destroyed in the USSR, and the physical workers and the managerial personnel are no longer enemies but friends and comrades.

It does not mean, however, that all distinctions between town and country or between physical and mental labour, have been obliterated. From the very nature of the social phenomena they cannot be obliterated. What is meant is the abolition of essential distinctions, which give rise to antagonism, and not those inessential distinctions, which you cannot remove because they are irremovable. Without a knowledge of this social background one cannot fully appreciate the line of demarcation between the Soviet fundamental rights and the 'democratic' fundamental rights.

17. Rights Rest on Socialist Ownership

Latent in the Soviet way of life is the assumption that you cannot guarantee to every person the freedoms he cherishes without abolition of capitalism and without the socialist ownership of the instruments and means of production. Therefore, among the Soviet fundamental

rights are those rights which guarantee the right to work, that is, the right to employment and payment for work in accordance with its quantity and quality (article 118); the right to rest and leisure (article 119); the right to maintenance in old age and also in case of sickness or loss of capacity to work (article 120); and the right to education, including higher education, free of charge (article 121). Such rights are not recognised as fundamental rights in the USA, Switzerland, England, Japan and India and, for that matter, in any formally democratic country where private ownership of the instruments and means of production has not been abolished. This is the first point of difference between the Soviet system and the other systems known to us.

The second point of difference lies in the fact that the Soviet system, unlike the other systems, does not merely state the rights, but guarantees the means by which these rights can be exercised. In each article stress is laid on this guarantee of means as well as on the right that is guaranteed. The Soviet system, like the 'democratic' system, proclaims democratic liberties, but unlike the latter it ensures them by providing definite material resources.

The source of these rights in the USSR is the socialist system of economy which has been established as a result of the elimination of private ownership of the instruments and means of production and of the exploitation of man by man. It is a complete repudiation of the fiction of man's natural and inherent rights, which is fostered and propagated by the ideological torch-bearers of the *status quo*, of the sanctity of private property, of the immutability of the social order to which they are born and by which they swear. This is the third point of difference which distinguishes the Soviet way from the 'democratic' way.

18. No Presumption of Antagonism Between State and Individual

The examination of the legal or constitutional formulations in the matter of fundamental rights in the

'democracies' must have shown that they are based on the principle of prohibitions, of preventions and of 'don'ts', thereby implying that there is a continuous and persistent antagonism between the individuals and the State, between capitalists and capitalists, between the individuals themselves. It is often suggested that the mammoth Soviet machine, the heavy-roller of 'communist' tyranny, suppresses the individuals, destroys personality and reduces human beings to automatons. The truth is the other way about. For, Jellinek, a famous non-Soviet jurist, has stated that in so far as man is subordinate to the State he loses his personality and that power can be realised only if individuals sacrifice themselves for the State. This theory presumes a continuous conflict between the State and the individuals. If the State power is to be realised—and that is essential—then the individuals must sacrifice themselves. Conversely, an individual's subordination to the State—and that is no less essential—implies the loss of his personality. That is not the Soviet way, which rejects the theory of antagonism between the State and the individuals.

Now that the class conflict has been abolished the Soviet way assumes a close and intimate identity of interests between the State and the individuals, because the State is no longer the dictatorship of the 'haves' directed against the 'have nots'. No longer, as Lenin observed, is the slogan: "Each for himself, and God alone for all". Instead the slogan is : "All for one and each for all". It is not merely a slogan; it is socialist practice for the broad flowering of human personality. In the course of his famous interview with Roy Howard in 1937 Stalin repelled the theory that socialism meant complete absorption of personality by the collective, the elimination of all individual freedom of every kind. Continuing he said: "Implicit in your question is the innuendo that socialist society negates individual freedom. That is not so. We have not built this society in order to crush individual freedom. We built it in order that human personality feels itself actually free. We built it for the

sake of genuine personal freedom, freedom without question marks. What can be the 'personal freedom' of an unemployed person who goes hungry and finds no use for his toil ?"

It is true, of course, that there is no place, in theory or in practice, for the exploiting classes, private owners of the instruments and means of production in the USSR. Subject to the socialist pattern of values, there is no assumption of antithesis between the State and the individuals. Only in societies where there is exploitation of man by man, are the State and the individuals irreconcilably antithetical. There is no room for it in socialism. This is the fourth point of difference between the Soviet declarations of fundamental rights and the legal or constitutional formulations in non-Soviet States.

All the propaganda directed against the Soviet way is not due entirely to deliberate distortion of facts. It is difficult for men and women, born to a particular system and accustomed to a particular pattern of values, to appreciate the changes in all their implications which a social revolution brings about. The first stage of revolution is a resistance to a hostile environment. That resistance moulds the mind and character of every individual. Then he matures and awakens to the necessity of remaking his environment and the entire social system. A people's struggle begins—a class struggle—and its success produces vast and sweeping changes in the economic conditions of social life. In the process a new socialist consciousness is called into being and a new code of social and individual behaviour is established. All this is the basis of a genuinely new social and individual morality. It is the morality, to quote Lenin, of "all for one, and each for all."

19. Not a Programme But a Record of Achievements

The fifth point of difference arises from the fact that the Soviet declarations, unlike the declarations or maxims in the 'democracies', register and embody, as has been pointed out by Stalin, what has already been achieved and won in actual fact. Apart from the inherent inadequacy

of a formulation for lack of material means to translate it into action, which characterises the 'democratic' constitutions, principles are enunciated which are neither susceptible to precise definitions, nor in any way accessible to the people for whom they are intended. Take, for instance, a long series of pious wishes designated 'the directive principles of State policy' in our constitution, borrowed mainly from the Irish text. There is no such confusion in the USSR.

The Soviet declarations of fundamental rights are not part of a programme which may or may not be pursued in the future. They are not interspersed with 'ifs', 'buts' and 'don'ts'. They are concerned with the present. They are a record of achievement, a real and accurate picture of 'conquered territory', and not a vapid imagery of distant 'virgin soil'. We talk of a thing which does not exist, which is not within our grasp. That is programme. They of the USSR tell us of the fruits of their sweat and blood. That is achievement. In Britain they talk of equality before the law; in the USA, of the equal protection of the laws; and in India we talk of both.

All these countries speak of rights of citizens, and not of their obligations, preferring to impose them upon citizens and others through ordinary laws and ordinances. In the USSR, by contrast, the constitution speaks of both, of rights as well as of obligations. This is the sixth point of difference between the Soviet system and the 'democratic' system.

"Equal obligations", wrote Engels, "are for us a particularly important addendum to bourgeois-democratic equal rights, an addendum removing the specially bourgeois meaning from the latter". The obligations contemplated in the USSR constitution, apart from the obligation to work, include observance of the constitution, of labour discipline, of rules of socialist community life; safeguarding socialist property; and universal military service; and defence of the socialist 'fatherland' (articles 130-33). The rights and obligations are inseparably connected.

Why is this difference between the Soviet system and other systems ? The primary reason perhaps is that the

USSR constitution, while guaranteeing the right to work, insists that labour is an obligation and a matter of honour for every citizen who is not physically or otherwise incapable of it (article 12). "He who does not work does not eat" is the basic principle of socialist ownership of the instruments and means of production. Naturally, where idleness coupled with exploitation is a social virtue, no insistence on obligations is either possible or desirable. Another reason is that in 'democracies', as I have already shown, the interests of individuals are in conflict with the claims and pretensions of the State which is no other than the dominant class organised politically for coercion of the majority. That becomes clear from the provisions for oaths or affirmations for heads of 'democratic' States, their ministers and judges and for members of Parliaments and legislatures, but not for the vast bulk of the community. There is complete identity of interests between the State and the first category of persons, but not between the State and the second category which embraces the millions.

20. The Soviet Way versus the 'Democratic' Way

I need not deal with different aspects of fundamental rights provided for in the USSR constitution and the means for ensuring the exercise of those rights. One cannot fully understand or appreciate them in all their implications unless one tries to reach down to the roots of the Soviet system. Hence attention is specially invited to its peculiar features which I have tried to examine at length. Nevertheless I believe that a few words about what is called personal freedom are appropriate in the present context. Sir Alfred Denning, who has been previously quoted more than once in these pages, admits that in England in war time the executive are empowered to take away the personal freedom of the individual. It is, to him, a war-time precaution, but not a peace-time rule. But in the USSR, he says, the personal freedom of the individual is in constant peril, war or no war. In England the safety of the country, he concedes, calls for drastic measures, and drastic

measures are unhesitatingly adopted. In the USSR, on the other hand, in the interest of the communist way of life only this kind of drastic executive action is frequently resorted to. What in England is a 'hot war' contrivance is, under the Soviet system, a 'cold war' stratagem.

In this fashion Denning proceeds to distinguish between the English way of life and the Soviet way of life. According to the English way, the freedom of the individual must not be impaired except so far as absolutely necessary, whereas the Soviet way of life want only sacrifices the freedom of the individual to the interests of the State. This is a distinction without a difference. This is a vain and ponderous attempt to choose between tweedledum and tweedledee. Denning does not deny that if and when the foundations of the social order are attacked, the challenge must be effectively resisted and met. The English State does it in the name of war; the Soviet does it whenever there is a challenge. But the fact is that where there is agreement on fundamentals there is no interference with personal freedom. Where on the contrary, there is no agreement, personal freedom is in jeopardy. This is as true of the Soviet system as it is of the English system.

The difference lies in fundamentals, in the social norms, in the patterns of values. In England, for instance, the ruling class think that private ownership of the instruments and means of production is fundamental to civilised social existence; that private gain is an incentive to progress ; that if you are weak and backward, you deserve to be enslaved or used as a commodity just as any other commodity. The Soviet system denounces all these maxims. It repudiates the pernicious doctrine that everything is measured in money; that human personality and conscience, love and affection are subjects of purchase and sale through the - medium of a consideration. The ruling class of a capitalist State wage their grim battles for their private property and instruments of exploitation at home and abroad, and cajole or coerce the broad masses into fighting their battles. The Soviet system makes war on poverty, disease and dirt,

and battles for plenty and freedom, and it is the people's war in the people's cause. And the people are their own rulers. Whether it is a 'hot war' or 'cold war' is immaterial from this point of view.

Besides, the Marxian theory, on which the Soviet system is mainly built, repels the 'idea' of the State as distinguished from the 'concept' of the State. The Marxists do not subscribe to the American Supreme Court's description of the State in a famous case to the effect that it is "an ideal person, intangible, invisible, immutable". To them, it is not an 'abstract idea' or an 'idea' existing in the imagination of mankind without reference to concrete reality, and representing "a picture, in the splendour of imaginary perfection, of the State as not yet realised but to be striven for". To them, the State is a concrete historical phenomenon. They believe that in certain conditions the State will just wither away. Such a theory, whether you accept it or not, is opposed to deification of the State. Consequently, the Soviet system considers it preposterous that everything must be sacrificed to the State and that individuals must efface themselves. The boot is on the other leg, on the leg of the bourgeois idealists, and not on the leg of those who take their stand on the materialistic interpretation of history.

It is wrong to think, however, that so far as personal freedom is concerned, the USSR follows no law or procedure and that arbitrary arrest is the general rule. Citizens of the USSR are guaranteed inviolability of the person. No person may be placed under arrest except by decision of a court or with the sanction of a procurator (article 127). The court or the procurator, in issuing a warrant for arrest, is called upon to verify the necessity and legality of the arrest in any particular case. That the judges and procurators are the chosen men of the people, the toilers, is a guarantee against the abuse or misuse of this power. Subject to the safety of the State and society, and within the social norms of the socialist ownership of the instruments and means of production, the freedom of the person is not open to attack or subject to any restraint.

It is, of course, admitted that an individual loses that freedom if he is found by word or deed to undermine the foundations of the Soviet order, not merely by the fiat of the executive but by the people's verdict. Not to speak of the State, the people themselves would never tolerate it. If by freedom you mean freedom to destroy what has been achieved through trial and error during these long thirty years, there is no freedom in the USSR. Otherwise, the inviolability of the person is complete and unequivocal. Except for agents-provocateur, imperialist agents and enemies of the toiling men and women, the right to personal liberty is a normal and universally recognised rule under the Soviet system as under no other system where life for the vast majority is a never-ending struggle for food and shelter and against starvation and misery.

CHAPTER IV

DEMOCRACY VERSUS TOTALITARIANISM

1. Man set against Machine

In learned dissertations, no less than in polemical literature, mention is often made in rather scathing terms of totalitarianism. What is meant by this pompous word is not made sufficiently clear. An attempt has, however, been made to explain it by a well-known British jurist, Sir Alfred Denning, Lord Justice of Appeal. He says that in a totalitarian way of life the freedom of the individual must always give way to the interests of the State. In the Anglosaxon or the western democratic way of life, by contrast, the freedom of the individual must not be impaired except so far as absolutely necessary. What, one wonders, is the freedom of the individual? What are the interests of the State? Why and how do they come into conflict with each other? What authority is finally the arbitrator in this conflict? These simple questions do not occur to him, and naturally one cannot expect of him simple answers.

But the Soviet Union is branded as a totalitarian State by the defenders of the 'democracies', including that British Lord Justice of Appeal. Why do they take this gloomy view of that State, which was an ally of the 'democracies' in the Second World War and whose heroic role in the overthrow of Hitler Germany and Japan was acclaimed by the allied leaders, including Churchill, as a great contribution to the cause of peace and democracy? Has the character of the Soviet Union undergone a qualitative change since the cessation of hostilities? Has the supreme power of that State changed hands? Is the State machine operating today in a manner basically different from what during the war was the recognised channel of transmission of its will into laws, statutes and executive orders? To each of these questions the answer is in the negative.

2. Universal Franchise in USSR

What, then, is the plausible justification for this abusive epithet? Well, if universal franchise, as many argue, is the basis of democracy, they have it in the Soviet Union. The Soviet law in this regard is more liberal, more progressive than that in certain democracies. In the 'democracies' the youth below 21 to 25 years old are, on the average, debarred from active franchise, that is, the right to vote. Passive franchise, that is, eligibility for membership is restricted to older persons. The age qualification for the Upper Chamber is fixed still higher. By this age restriction a large proportion of the toiler-workers are deprived of a valuable political right.

In the Soviet Union, on the other hand, a citizen who has reached the age of eighteen, irrespective of race or nationality, sex, religion, education, domicile, social origin, property, status or past activities, has the right to vote. In regard to what is called 'passive franchise' the minimum age of eligibility is twenty-three years, irrespective of the Chambers to which election is sought (article 135). In the USA women were conceded the right to vote for the first time in 1920; in Britain in 1928; in France in 1945. Even today women have no voting rights whatsoever in Switzerland; which, in the opinion of many, is a model democracy. In a much discussed cantonal referendum in 1953, in which, of course, only the men took part, the votes cast against franchise for women were much larger than those cast for it. This followed, significantly enough, an unofficial vote by the women themselves, in which the right to ballot had been earlier supported by six to one, an overwhelming majority. So in the 'ideal' Swiss democracy almost half the entire adult population have no right to participate in the election of national or cantonal law-making bodies. By the political rule of trusteeship women are treated as *Jimmies*, if I may use that expression, against their will and consent.

In the 'democracies', generally, there is what may be called a mandatory residential test, both for active and passive franchise. It is far more stringent for passive

franchise than for active. In Britain the law requires three months' residence in one place; in France six months; in the USA from three months to two years, according to the respective laws of several States; and in India one hundred and eighty days. As to eligibility for membership of the legislature (passive franchise), almost permanent residence is necessary in the USA. No person shall be a member of the House of Representatives unless he has attained to the age of twenty-five years, and been seven years a citizen of the USA. Even with these qualifications a person is not deemed eligible, for it is further required that, when elected, he must be an inhabitant of the State in which he is chosen [article 1, section 2(2)]. A Senator must be at least thirty years old, and nine years a citizen. In his case, too, the law requires that he must be an inhabitant of the State for which he is chosen [article 1, section 3(3)]. These provisions apply to all, but, in addition to these qualifications, Negroes have to answer, to the satisfaction of the appropriate authorities in their respective States, difficult and complicated questions bearing on the American constitution to earn eligibility for active or passive franchise. This test of residence keeps a large body of citizens or nationals outside the parliamentary forum. In the Soviet Union no such qualifications, based on nationality, race, property and education, are insisted upon. There are no such restrictions in that 'totalitarian' State.

Well, if direct and secret voting is a criterion of democracy, the Soviet Union does not fall short of it either. The Fundamental Law of that country provides that deputies are chosen by the electors on the basis of universal, direct and equal suffrage by secret ballot (Chapter XI). In the 'democracies', on the other hand, apart from the hereditary membership of the British House of Lords, there are provisions for indirect elections as, for example, in the case of the election of the USA President. The President and members of the Council of States and the State Councils in our country are also elected indirectly. A certain proportion of the members

of these Upper Chambers also comes through nomination of the President and the Governor or Rajpramukh, as the case may be.

3. One-Party Rule in USSR

How, then, is the Soviet Union a sinner in the sacred 'democratic' temple ? Why is it accused of totalitarianism? Perhaps the answer is that the Soviet Union is dominated by one-party rule, that no party other than the Communist Party is tolerated, that it is a monolithic machine. I have already said that the State in any event is, in the last analysis, a dictatorship, its form and content being a reflection of the class character of its directorate. This proposition should be kept in mind in dealing with the question of political parties and their role in the running of the State apparatus.

What is a political party? Edmund Burke defined a party as "a body of men united, for promoting by their joint endeavours the national interest, upon some particular principle in which they are all agreed". This much-quoted definition leaves many things vague and imponderable. What is 'national interest'? What is a 'nation'? What is an agreed 'principle'? If 'nation' means 'State', the interests vary from class to class where the classes have not been eliminated. If 'nation' means an ethnological group, there are States which, like the USSR, Canada, South Africa, Switzerland and even India, are multinational. The interest of which group is national interest? Does not 'principle' involve the question of approach to political and social problems, a sort of mental and ethical attitude, a particular way of life? Stripped of its idealistic trappings, Burke's definition cannot be construed as excluding consideration of the material interest that distinguishes one group of individuals from another.

In ancient times there were no parties in the sense in which we have them now, but the organised political community, that is, the State, was rooted in the conflict of economic classes. In ancient India, apart from the division of people into Aryans and non-Aryans, we had Brahmins,

Kshatryas, Vaisyas and Sudras, the classification being determined with reference to their functions in society. The Athenian society in the Greek City State was organised into families and tribes. In Rome, too, it was the privileged tribes that controlled the State machinery by a sort of checks and balances and took decisions on questions of war and peace and of internal security. All these decisions were directed toward furthering the interests of the ruling tribes and families and, in the process, extracting by coercion the surplus value from the ruled.

In the Middle Ages the tribes and families yielded place to the 'estates', a term which is still in vogue in Anglo-Saxon political literature. In Britain, for instance, they refer to the three 'estates' of the realm, namely, (1) the Lords Spiritual, (2) the Lords Temporal, and (3) the Commons, who for centuries have been represented in Parliament to aid and assist the King in running the British State. These 'estates', meaning the major classes, have grown and developed historically on the basis of conflict of economic interests or of internal contradictions. It is true that the class character of the 'estates' is not constant or invariable. From epoch to epoch adjustments and readjustments in the class composition of the 'estates' have occurred in consequence of internal contradictions, and of the conflict between the productive forces and the relations of production. In the course of time the class character of this division took a more concrete shape. It was no longer based on families, tribes and estates. This change was brought about, in the economic sphere, by the Industrial Revolution and, from the point of view of the ideological superstructure, by the Reformation and the Renaissance in Europe. No longer was the unit of society the family, tribe, or estate; the individual replaced it and rights accrued to, and obligations were imposed upon, individuals as members of society.

4. The Class Basis of Political Parties

With the introduction of the Cabinet system of government after the Revolution of 1688, the early division

of the governing class in Britain was into the Tories and the Whigs. Later on, they came to be known as the Conservatives and the Liberals. This alignment was marked by the inner contradictions, but there was, on the whole, no sharp class conflict between these parties. For, however bitterly they fought one another in Parliament or outside, they were agreed on certain codes of political conduct which they considered fundamental. In historical perspective the Conservatives stood for protection, whereas the Liberals advocated free trade. The Conservatives wanted to pursue a strong colonial policy, whereas the Liberals pleaded for certain concessions.

But both the parties accepted a certain way of life. Both believed in the institution of monarchy, in the parliamentary system of government, and in what they called the conventions of the constitution. Both were wedded, if in varying degrees, to exploitation at home and colonial expansion abroad. To both the British rule, as symbolised by the King-in-Parliament, was as indispensable as it was eternal. Politics were to them, more or less, a sporting contest, maybe, on occasion, in the nature of a cup-tie fight in football, or of a keen and grim struggle for the 'rubber' and the mystic 'ashes' in Test Cricket. In these, as in other branches of sports, there is agreement between the parties on laws and byelaws, rules and regulations, and decisions on controversial points within the limits of the recognised ethics of the games are left to umpires.

In a period of expanding capitalism they could well afford to indulge the luxury of this give-and-take principle. But this traditional pattern of party behaviour has been shaken by the crisis in capitalism and, in the course of the last fifty years or more, Labour, as a political party, has forced its way into the sacred and hitherto inviolable precincts of the governing class. In Britain today the competitors for political supremacy are the Conservatives and Labour, with the Liberals being gradually pushed out of the political scene for their lack of understanding of the complex problems which have rendered their adherence to vague enunciations of ideals absolutely futile.

And yet it would be wrong to think that British Labour, as a political party, is a conscious and determined class force. The result is that almost like the old Liberals, whom they have displaced, they do not challenge the foundations of the British political system. On any social and political questions, if you will scratch a Labourite, you will find him a Conservative and *vice versa*. Within the pattern, and subject to its limitations, occasionally they change places from the Opposition to the Treasury Bench and from the Treasury Bench to the Opposition. By the law of the game Her Majesty's Opposition is Her Majesty's alternative Government and, on crucial issues, there is nothing to choose between the domestic disputes of a club and the fierce controversies inside Parliament. So intimate and close is the relationship between the Treasury Bench and the Opposition that the Leader of the Opposition is today on the pay roll like the Ministers of the Crown.

If one examines this question in historical setting, the picture becomes still more clear and bold. In the eighteenth century the Tories had sought to build their earthly paradise on the landed interest; most of them were landowners. In the nineteenth century the Whigs thought that the paradise lost to the Tories could be regained by them on the basis of free and unrestricted competition. Most of them, ousted from land under the pressure of economic forces, dreamt of new conquests by initiative, enterprise and adventure. But to both, the function of the State was, to 'keep the ring', and when the fight was over, to hibernate for the rest of the year. After 1886 both the parties were forced to shed their individualistic illusions. The trend of policy readjustments between the parties, including Labour, has been accelerated by the shocking events of the two World Wars. Fundamentally what is sauce for the Conservative or Liberal goose is sauce for the Labour gander. Of course, events now and then cause a split and precipitate a constitutional, and not social, crisis, almost in the same manner, as in Test Cricket, a Larwood 'bumper' or a Jardine harlequin cap provided several years ago the background material for a diplomatic duel

between an old and tried mother and an ambitious but naughty girl.

The alignment of parties in the USA is not on a different plane. After the successful revolt in 1776, and even at the time of the First Congress under the constitution of 1787, they proceeded on the assumption that there was complete agreement on fundamentals such as liberty, equality and sanctity of property and that, for that reason, there was hardly any need for political parties in the management of the State. But soon the pressure of circumstances provoked a conflict of interests. Some wanted a strong national government, while others defended State rights. Some stood for 'slave' States, while others demanded the abolition of slavery. Some advocated a strong tariff wall, while others were wedded to the *laissez faire* doctrine. Then there were other issues on which the bulk of the politically conscious people could not see eye to eye.

Two big parties emerged, namely, the Republicans and the Democrats. But in the USA, as in Britain, there is little difference in fundamentals between these traditional parties. Where there is difference, it is one of emphasis, and is rather *pro forma* than substantial. If, as I contend, political parties are no parties unless they are based on class affiliations, these well-known British and American parties are no better than factions, from the point of view of their mutual relations. And it is not for nothing that in the earlier phase of America's independent political life James Madison, in common with the founders of the system, should have referred to 'faction' and not to 'party'. These parties are organised groups that seek, subject to the fundamental law of the land, to control the policy as well as the personnel of the Administration.

Of course, other parties are emerging both in Britain and in the USA—radical parties that are committed to a policy programme of far-reaching changes involving the entire class structure of the State. These parties do not at present count very much in parliamentary politics, and it is doubtful if, by the normal parliamentary processes, the end they have

in view may be achieved. By the procedure of debate and discussion they may clarify issues and create an atmosphere of resistance to the dominant class, that is, the State, and to this extent the parliamentary system is preferable to feudal autocracy or fascist authoritarianism. And that perhaps is all.

In Britain and in the USA constitutional development rests on the basis of a party Government, the one major party in position of authority and the other in opposition, although on account of difference in the institutional forms the American parties do not play exactly the same role as is appropriate to the British system. The two-party system has not, however, taken roots in the Continent of Europe; a multiple-party system is generally prevalent, particularly in France.

5. Political Parties in India

In India the major political parties during the British regime were the Congress and the Muslim League. The programme of these parties had little or no social content except perhaps to the extent that at certain plenary sessions the Congress vaguely spoke of economic programmes and that the Muslim League pleaded, in a demagogic fashion, for Islamic democracy. It was mainly directed, so far as the Congress was concerned, toward ousting the British from seats of authority for the whole of India and, so far as the Muslim League was concerned, toward partitioning India as a condition precedent to the transfer of power and creating, in the process, a separate State for the predominantly Muslim areas. There were, of course, other parties, the best organised being the Communist Party who, apart from demanding complete liquidation of the British regime, placed in the forefront of their programme a broad outline of what productive relations were to be striven for and by what definite means.

On and after the transfer of power the social basis of the ruling parties is crystallizing, but no party has yet emerged either in India or in Pakistan with the immediate possibility, on the basis of parliamentary give-and-take after

the British pattern, of playing the game and taking over from the ruling party. Parliamentary government, in a broad sense, is essentially a party government; and unless parties are organised and trained in such a manner that they may agree to take certain things for granted despite difference over non-essentials, that kind of government is bound to fail. There is ground for belief that in India, as in Pakistan, parliamentary government in the western sense will not succeed for the reason, first, that the material conditions congenial to such a system do not exist in either country; and, secondly, that even in Britain it is now incapable, by its social and moral inadequacy, of surviving the strain of capitalism in crisis. In an epoch when the progressive role of capitalism seems to have exhausted itself by the conflict it necessarily precipitates between the forces of production and the productive relations, the principle of give-and-take, which is vital to parliamentary government, is rapidly reduced to a fiction. It becomes a pastime for the privileged few; to the vast majority it is a disgusting and provocative irritant.

6. The Basic Assumptions of 'Democracies'

It is assumed that in democracies people have the right to form parties, that the parties are free to mobilise opinion and to express it through all possible channels accessible to them and to transmit it, by democratic procedures, into parliamentary representation as well as, through such representation, into statutes, ordinances and orders. Conversely, it is assumed parties, properly organised and conscious of their rights and responsibilities, keep democracies functioning effectively and give them the driving force. To a limited extent these assumptions are correct. But in an atmosphere of sharpening crisis, or of acute class conflict, they do not hold good. Nor can they be relied upon when the accepted way of life is challenged, or the foundation of the power of the dominant class is sought to be undermined.

Will the American State, the British State or, for that matter, the Indian Union allow individuals to organise themselves into a party for the purpose of propagating,

within or without the legislature, head hunting, a custom which prevails among certain tribes ? No, they will not. Why not ? Because our social conscience has reached a level where this custom is not tolerated. To a healthy, brave man of such tribes, the banning of this custom constitutes a cruel interference with the exercise of individual freedom. To him, the abolition of head hunting is anti-social; to us the adherence thereto is not only anti-social but inhuman. Will the 'democracies' leave a party free to propagate defiance of laws which they honestly consider to be detrimental to the public good ? No, they will not. Why not ? Because they think that while individuals or parties may discuss, debate or even denounce the policy or programme of the government, they are not entitled to attack the source of power and authority of the State.

7. The Basis of One-Party Rule in USSR

In the USSR, it is true, there is constitutional recognition of the Communist Party and of no other political party as such, although the right to nominate candidates for election as deputies is guaranteed not only to Communist Party organisations, but to trade unions, co-operatives, youth organisations and cultural societies as well (article 141). Where, to quote once again the apt words of Madison, it is not a 'faction', a party is part of a class, yes, its most advanced, active and combative part. If that definition is correct, more than one party within the territory of a State presupposes the existence of more than one social class as, for instance, landlords and peasants, rich peasants (kulaks) and poor peasants, capitalists and workers. Parties are organised to pursue their antagonistic class ends, even though, by way of propaganda or self-deception, they may chatter about the 'general will,' 'public good,' 'divine purpose,' 'eternal category,' 'white man's burden' and so on and so forth. Broadly within the same class 'parties' may grow, as is illustrated in modern times by the Republicans and the Democrats in the USA and by the Conservatives, Liberals and the Labour aristocracy in Britain. These are not parties in the real sense of the term, for they have

adjusted themselves, despite persistent contradictions, to a definite way of life, a particular pattern of social values. They are 'factions' because they concentrate, subject to the agreed reservations, on a change of personnel of the Administration and on formal readjustments in policy.

There are no antagonistic classes any longer in the Soviet Union. The exploiting classes have been eliminated. The economic foundation of the USSR is the socialist system of economy and the socialist ownership of the instruments and means of production (article 4). This socialist property exists either in the form of the State property (belonging to the whole people) or in the form of co-operative and collective farm property (belonging to co-operatives and collectives). In the State enterprises, the instruments of production and the product of production are alike the property of the whole people. In the collective or co-operative farms, although the instruments of production such as land and machines do belong to the whole people, the product of production is the property of the different collective or co-operative farms. There is, therefore, commodity production in the USSR in a certain sector, that is, in the collective or co-operative sector. But it must not be identified with capitalist production. Commodity production, historically, is the highest form of capitalist production. But commodity production leads to capitalism only if, as Stalin puts it, there is private ownership of the means of production; if labour power appears in the market as a commodity which can be bought by the capitalists and exploited in the process of production; and if, consequently, the system of exploitation of wage workers by capitalists exists in the country. But these 'ifs' have no place in the Soviet economy.

What, then, is commodity production in the USSR? There are, as is pointed out by Stalin, two basic forms of production in the Soviet Union : (i) State or publicly-owned production, and (ii) collective or co-operative farm production, which cannot be said to be publicly-owned. Consequently, the State disposes only of the product of the State enterprises, while the product of

the collectives or co-operatives, being their property, is disposed of by them only. The latter are unwilling to alienate their products except in the form of commodities. At present they do not recognise any economic relation with the town other than the commodity relation, that is, exchange through purchase and sale. This is commodity production as distinct from products-exchange which may be adopted and worked out through a single national economic body when the present division of the socialist economy into two sectors is abolished.

8. The Character of Property in USSR

Thus there is collective or co-operative farm property; there is commodity circulation with its 'money economy'; there is still the law of value in operation, which, nevertheless, has ceased to function, as under capitalism, as a regulator of production. There is also inequality in wages among individuals. There is, besides, some personal property. For instance, every household in a collective farm has, as its personal property, a subsidiary husbandry on the plot, a dwelling house, livestock, poultry and minor agricultural implements. 'Personal property' must not be confused with things and property for 'personal use'. Every collective farm household has, for its personal use, a small plot of household land, in addition to its basic income from the common, collective farm enterprise (article 7). Alongside the socialist system of economy, which is the Soviet Union's predominant form of economy, the law permits the small private economy of individual peasants and handicraftsmen based on their labour but precluding the exploitation of the labour of others (article 9). The Soviet law further protects the personal property right of citizens in their incomes and savings from work, in their dwelling houses and subsidiary home enterprises, in articles of domestic economy and use and in articles of personal use and convenience, as well as the right of citizens to inherit personal property (article 10). A Soviet citizen is free to dispose of his personal property as he sees fit. He may use it personally, let other people use it or simply

give it away. The Soviet law, both civil and criminal, gives every protection to a citizen's personal property.

One point in connection with the Soviet law of inheritance deserves more than a passing notice, having regard to the persistent propaganda carried on by some of the doughty champions of 'western democracies' that in the Soviet Union there is no family life, that there is no room for filial affection, that children are not properly looked after, and so on. That all this is false tendentious propaganda has been authoritatively proved by unbiased students of the Soviet system, its institutions and its way of life. If one examines its law of inheritance, one will be convinced what a degree of solicitude the Soviet State shows towards disabled parents, widows and minor children.

All heirs are classified into three groups. The legacy passes to the heirs of a following group only in case there are no heirs in the preceding group or in case these latter have declined it. The first group includes the husband or wife, as the case may be, children, both male and female, and disabled parents of the deceased, as well as any other disabled persons dependent upon the deceased for not less than one year prior to his death. Able-bodied parents constitute the second group of heirs, and brothers and sisters of the deceased the third group. So, from the point of view of the deceased's nearest relatives, the Soviet law of inheritance is much more considerate, liberal and humane than the laws with which the 'democracies', including our own, have made us familiar. Nevertheless it must not be forgotten that a Soviet citizen, whatever his personal property, cannot use it to exploit the labour of others, or to the detriment of the interests of socialist economy, or for speculative purposes. Nor has he any material or moral incentive, as under a capitalist system, for exploiting the labour of others. He or she is himself or herself a working man or woman, and his or her work is the only source of his or her personal property.

If, therefore, it is true that there are no antagonistic classes in the USSR, that no individual or group of individuals is allowed to exploit the means of production

to the detriment of the interests of others, there is no ground in that country for the existence of more than one party. Consequently, the question of the right to organise parties does not arise except perhaps in abstraction. Just as the 'democracies' have taken for granted a definite way of life, a certain pattern of social values, so has the Soviet Union. But its way of life is different, its pattern of values is not at par with the 'democratic' pattern. Like the 'democracies', it outlaws head hunting. Like the 'democracies', again, it resists ruthlessly defiance of the social basis of its organised political life. But unlike the 'democracies', it has banished unemployment guaranteed work to every able-bodied citizen, ensured social security for the sick and disabled, made education accessible to all and, above all provided the means whereby the rights offered under the constitution may be fully and freely exercised. All these rights and other freedoms such as the freedom of speech, of expression and of the press and the means designed to ensure the exercise thereof are fundamental in the sense that they constitute what is called the Soviet way of life, the Soviet pattern of values.

The Soviet State would not allow any person or group of persons to organise a party or parties to disrupt this way of life, this pattern of values. In other words, the Soviet Union does not recognise the freedom to tell its citizens that Providence has willed that there shall be difference in opportunities of good life between whitemen and blackmen, between men and women, between western races and eastern races; that plenty for the few and starvation for the many is inevitable; that under the inexorable operation of the cyclic law depression, boom and crisis are as unavoidable as the law of the physical sciences; that without private initiative and enterprise based on human exploitation the future of mankind is doomed; that if there is no exploitation, for private profit, of human material there can be no full and effective utilisation, for the common good, of the material resources; that some are born to rule while others are born to obey; that where there are no rich and poor, no exploiter and

exploited, no employer and employed there is no variety, which, according to some, is of the essence of life and of art. The freedom to propagate these doctrines or propositions, or to organise parties thereon is, according to the Soviet view, no freedom at all. It is inhuman and, consequently, outlawed. Would you call it totalitarianism? Would you denounce it as moral degradation? Would you brand it as the denial of the spirit?

Agreed, critics may say, but the 'democracies' at least do not ban or prohibit expressions of opinion denouncing their own social category, their pattern of values. Parties and organisations definitely hostile to them such as the Communist or Marxist Parties are allowed to function normally except in special cases. In no circumstances, they point out, does the USSR tolerate an expression of opinion critical of the Soviet system. Hostile action may be suppressed by the organised force of the 'democracies', but not expressions of hostile opinion as such. In taking punitive measures the 'democracies' draw a line of distinction between 'action' and 'opinion'. In this, if not in anything else, lies the basic difference, according to them, between the 'democracies' and the USSR.

Broadly speaking, these contentions have been covered in the preceding paragraphs. A few words may, however, be added by way of further elucidation. Now, the western democracy presupposes the existence of antagonistic classes in society, and its function is to 'keep the ring' where the diametrically opposed social categories are engaged in fighting for supremacy. The emergence of parties to represent the interests of these antagonistic classes is a natural phenomenon which cannot be suppressed without eliminating the social antagonism. This social antagonism may be eliminated by seeking to suppress the toiling millions as was attempted in Hitler Germany. It may, alternatively, be eliminated by suppressing the exploiting minority as has been done in the USSR. In the first case, the western democracy has to give up the pretence of 'keeping the ring' in a wrestling bout and to transform

itself, by the social law of motion, into a Fascist State. And a Fascist State, as history has proved, is not invulnerable to internal disintegration or to external challenge. So far as the alternative is concerned, the ruling party has to disown its class basis, which it cannot simply do.

The Revolution of 1917 and the far-reaching developments that have followed since have eliminated the social antagonism and its causes, and consequently the USSR is not confronted with those phenomena with which the western democracy is familiar. Where there is no cause there is no effect, and because in the USSR there are no hostile social categories there is no room for different parties or for expressions of opinion on the merits or demerits of such categories. The function of the USSR is not to 'keep the ring' but to create, nurse and nourish. I do not deny that in the present international context there may be individuals in the USSR who want to prattle about categories, class conflicts and the rest, but they cannot prattle about things which do not exist unless it is their intention to act as hucksters for contraband. And contraband-hucksters are treated alike in different parts of the civilised world, whatever the forms of their social and political institutions.

9. Freedom of Criticism Under Soviet Law

Assuming, one may ask, that there is no ground for the existence of more than one party, the party of the toiling workers in the USSR, in view of the abolition of all exploiting classes; assuming that the general mass of the Soviet people do not feel any need for parties based on class exploitation and would not tolerate the growth of such parties should individuals or a group of individuals try to organise them, is there no scope for difference of opinion among the members of the Communist Party themselves? Are the methods, one may ask, adopted by the members for implementing the party line and accelerating the pace of transition from socialism to communism in various sectors of Soviet industry and agriculture and in different areas, above criticism ? There is no place for

dogmatism in Marxism or in any Marxist party line. Nor is infantile romanticism or reckless adventurism compatible with it. Within the limits of the pattern of values as described above, there is complete democracy inside the Communist Party of the Soviet Union and inside the Union itself.

M. Malenkov's report, presented to the Nineteenth Party Congress held in 1952, throws light on this aspect of the matter. Members of the Party, as he observes, must subject themselves to what he calls criticism and self-criticism. They must strike at the manifestations of vainglory, bureaucracy and dogmatism. "It is particularly important", Malenkov adds, "at the present time to stimulate self-criticism and criticism from below, and ruthlessly to combat, as malignant enemies of the Party, all who hamper the development of criticism of our shortcomings, who stifle criticism, and answer it with persecution and victimisation". Emphasis is laid on criticism from below. Criticism and self-criticism tend to release the creative powers and energies of the people. By the continuous but judicious use of this weapon the masses come to realise that they are the masters of the situation. It is further emphasised that criticism from below cannot come as a matter of course, that it cannot develop of itself spontaneously. Criticism from below can come and spread only if every person who comes forward with criticism feels sure that he would not be victimised, that the defects he may point out would be remedied, and that the suggestions he may give would be looked into and given due consideration by the appropriate authority. The leading members of the Party are required to create the conditions in which all honest Soviet citizens may be encouraged to come forward boldly and fearlessly and to show defects and shortcomings in the work of organisations and institutions.

The right to offer criticisms is not restricted to members of the Communist Party only; it is extended to all Soviet citizens. The immunity from victimisation for criticism is not the privilege of Party leaders or of the Party members; it is the right of each and every citizen who accepts the

Soviet way of life as fundamental to individual or social behavior. It would, I am afraid, be distortion to suggest, as has been suggested in certain responsible quarters, that this right of criticism is not real, but of academic interest. This suggestion is contrary to fact, for the exercise of the right may, in extreme cases, lead to recall of deputies and other persons from their seats of power and authority—a democratic device which is provided for in the USSR constitution (article 142). Indeed there have been, since the elections of 1934-35, a large number of such recalls.

Certain substantive rights and procedural forms such as adult franchise, direct and secret elections and party organisations—ordinarily associated with democracies—have been discussed at some length. They have been discussed not with a view to propagating some cause as against another, idealising one system to the prejudice of some other. The considerations urged in these pages have been placed before the reading public generally, and the student community, in particular, in order that their attention may be directed toward an examination of facts as they are, and of the legal and constitutional provisions made in several well-known countries.

10. Rule of Law and Due Process of Law

These bring one to what are known as the Rule of Law and its bearing on fundamental rights. The concept of the Rule of Law in a specific, as distinguished from general, sense, which is supposed to characterise the British political system, may be traced to the evolution of the judiciary, the securing, after conflict with the Crown, of a measure of judicial independence and the evolution of judicial decisions and commentaries out of a large body of vague and indefinite customs. In a general sense, the idea seems to have originated from the Magna Carta in which one finds : "No freeman shall be seized or imprisoned.....except by the legal judgment of his peers or by the law of the land". In historical perspective, it was not a right, whatever it meant, wrested from the King by the people; it was a privilege obtained from the King by the Barons. The conflict

between the monarchy and the landed aristocracy brought about this social change, reflecting, as it did, a readjustment of productive relations. In the first quarter of the thirteenth century when this conflict occurred the broad masses had not come into the picture at all.

Then by gradual stages the idea permeated English society until after several centuries it came to be recognised as a settled doctrine of English law. For a long time indeed, following Coke's dictum, it had been held that "the common law will control Acts of Parliament and sometimes adjudge them to be utterly void when they are against common right and reason". This dictum, implying an inherent limitation on all legislation, was subsequently negated in Britain not, as is commonly believed, by judicial review but by the assertion of the power of Parliament, which was reflected in judicial interpretation. The power was passing from the hands of the feudal aristocracy to the bourgeoisie in the spheres of both legislation and administration, and the King's prerogatives, hitherto exercised by his immediate land-owning counsellors, were made subject to the directions in parliamentary legislation.

"The law of the land", an expression used in the Magna Carta, and interpreted by eminent commentators and judges, including Coke, provided the theoretical background of American rebels' defiance of the statutes passed by Parliament, and found its way in the American constitution as the 'due process of law.' While the English courts early recognised the supremacy of the statute law over the common law to the extent of conflict between the two, the American Supreme Court, for a long period, has held that where a statute was repugnant to the principles of natural justice it was null and void.

Going back to the Rule of Law, in a general and wide sense, it involves both a definite principle and a proposition of procedure for its application. It implies both a positive command and a negative restraint. It says what a person must do, or to what he must adhere in the conduct of social behaviour, and what he must not do, or to what he

must not adhere in his relations with fellowmen and the State. In a general sense, therefore, the Rule of Law implies (1) that there must be a definite and ascertainable rule of conduct for the violation of which one may be punished; (2) that the person proceeded against must be informed in proper time of the grounds for the action taken against him so that he may arrange for his defence ; (3) that the prosecutor must not be the judge; and (4) that there must be a definite and orderly procedure for the initiation as well as for the conduct of the proceedings in order that the aggrieved person may not be made a victim of an arbitrary power.

In this sense, the expression 'the Rule of Law' and the expression 'the principles of natural justice' have almost the same meaning. They are to be interpreted and applied, subject to necessary adjustments, to concrete cases in given circumstances. In this sense, the expression 'due process of law', as used in the American constitution (Fifth and Fourteenth Amendments), has been interpreted by the Supreme Court in a number of important cases. It is true that no uniform and consistent view has been taken even by American judges of the exact meaning of this phrase. Some authors have sought to divide the history of the Supreme Court's interpretation into three periods. During the first century of the American Government it was interpreted, they observe, mainly as a restriction on procedure by which the power was to be exercised. The second period, which, extended from the end of the first period to 1936, was marked by emphasis on restriction as to both the procedure and the substance of the Governmental activities. During the third period, extending from 1936 to date, it has been restored generally to its original position as a restriction on procedure only, and not on the substance of law.

It is, of course, common ground that the trends of judicial review or interpretation have changed from time to time, but the changes have by no means been mechanical. It cannot be suggested, as is suggested by some commentators, that in a particular year learned and distinguished

judges took one view of the constitution and its clauses and then, as soon as the year was out, a different view came suddenly to be canvassed by them or their successors. The whole State machine moves organically, and the nature, character and tempo of the movement are conditioned by social contradictions or conflicts. The second period was one of expansion of capitalism; it was yet playing a somewhat progressive role, although the sense of security was upset by the depression of the 'twenty-thirties. Consequently, the judicial review as a process of adjustment was accepted without much protest as part of the law of the game.

The capitalistic crisis developed during the third period, and the State power, more and more, accrued to the Administration as the major exponent of policy, so that the conflict might be moderated, to some extent, by palliatives. Thus in a measure the Supreme Court's power of judicial review was exposed to challenge. But the commentators' description of what they call the first period is not borne out by the unassailable evidence of history. For instance, in well-known decisions such as those in *Marbury v. Madison* (1803), the *Dred Scott Case* (1857), *Gordon v. United States* (1865) the judicial review placed restriction not only on procedure but also on the substance of the statutory law. The broad fact, however, remains that unlike the courts in England and many other countries, including our own, the American Supreme Court has, in a general way, upheld the principle, relying on the doctrine of separation of powers, that it has power to declare Acts of Congress and of the State legislatures unconstitutional and void by reason of their repugnancy not only to the specific provisions of the constitution but to what may be described as the moral categories of natural justice. How long and to what extent adherence to this principle can be supported or sustained in view of the appalling crisis of capitalism is now essentially an issue in doubt.

11. Three Meanings of Rule of Law

To Dicey belongs, however, the credit of restating the expression 'Rule of Law' in certain specific formulations.

Starting with the proposition that "the rule of law is the fundamental principle" of the British constitution, the author thought that "it may be regarded from three different points of view". It means, in the first place, affirmatively, predominance of regular law as opposed to arbitrary power ; and, negatively, it excludes the arbitrariness or wide discretionary authority on the part of the executive government. It means, in the second place, affirmatively, equality before the law or the equal subjection of all to the ordinary law of the land administered by the ordinary law courts; and, negatively, it excludes any exemption of officials or others from the operation of the law which governs other citizens, or from the jurisdiction of the ordinary courts. Within the British system, that is, there can be nothing really corresponding to the administrative law (*droit administratif*) or to the tribunals (*tribunaux administratifs*) of France. In that country and, to an extent, in the Continent of Europe, the disputes, in which the Government or its servants are involved, are not subject to adjudication by ordinary courts, but are dealt with by tribunals especially constituted for the purpose. That, according to Dicey, is alien to English law and to the traditions and customs of the English people. "Rule of Law" means, in the third place, that it is not the constitution that has given Englishmen their rights, but that it is the rights of the private individuals as interpreted in judicial decisions that have given Englishmen their constitution and its law and customs. In other bourgeois countries where constitutions are written into articles or sections people come to know from those documents what their rights are in relation to one another and to the State. That is not so in Britain. The rights the people in England have exercised for centuries, particularly since the eleventh century, the rights as interpreted and expounded from time to time by courts of law and embodied in their decisions, form the basis of what are commonly known as the principles of the constitution.

In defending Dicey's thesis against the growing accretion of judicial or quasi-judicial power to Ministers

and Ministerial tribunals, Lord Hewart, a former Chief Justice of England, allowed himself, several years ago, to be carried away by his master's eloquent phrases to such an extent that he himself grew somewhat lyrical about the so-called principles of English law. In his famous book entitled *The New Despotism* (first published in 1929) he wrote : "They (the principles) have become a second nature. They are, so to say, part of the bracing air we breathe. Nothing perhaps is more profoundly repugnant to the English mind than that authority should be irresponsible or uncontrolled, that it should operate at pleasure or in the dark, that men should live in an atmosphere of uncertainty as to the nature of the rights they enjoy or the penalties to which they are exposed, or that among fellow citizens there should be one code for one class of persons and a different code for others". Every person clothed with authority, from the Prime Minister down to a collector of taxes or a constable, owes the same responsibility, one is told, for every act done without legal justification, as any other citizen.

To Dicey the little island home of the Englishman was a flower garden which offered many choice blooms for the picking. In Lord Hewart's energetic hands this riotous flower garden came to be subsequently transformed into luminous chaos. To an extent, however, both Dicey and Hewart were doubtless correct. In England they developed, in a period of creative capitalism, a system which gave a sense of freedom and security to the upper strata of society and which, by judicious distribution of a small proportion of the colonial spoils, satisfied the minimum needs of the rest and rallied them in support of the order. But both the master and his worthy disciple forgot that capitalism was one of those forces which only strong fingers could gather, a stream which, if you liked, you could direct, but you could not dam.

In ancient times, of course, the King governed in his own right, representing in his person, the omnipotent divinity as well as the principle of perfection. Then the feudal Barons challenged the King and succeeded in forcing

from him a guarantee that nobody was to be punished except by the verdict of his peers and in accordance with the law of the land. Now, for two centuries or more the British system has been, within the country, what at best is a plutocratic democracy and, without, a kind of shrewd colonialism, adapting its strategy to the changing phenomena of history.

A product of capitalism in constructive plenty, Dicey possessed no indecorous inquisitiveness to investigate the sordid problems of those tens of thousands who slaved within the limits of the system or who, failing to come up to the requisite standard demanded of them, exposed in their hunger and misery the capricious cruelty of the legal norm euphemistically called the rule of law. Confronted with capitalism in decay at home by internal contradictions and in retreat abroad by colonial challenge and upsurge, but callously indifferent to its logical and inevitable consequences, Hewart persuaded himself that, but for the bureaucracy's persistent effort, since after the First World War, to employ the sovereignty of Parliament to defeat the rule of law and to establish a despotism on the ruins of both, the little island home of the Englishman would be a bed of roses for all, a paradise for stricken humanity. But scholars like Dr. Jennings and Dr. Robson, who have no weakness for radical views, have refused to take for granted the thesis propounded by Dicey and elaborated by Hewart.

12. The Rule in Practice

As to the substance of the first point, namely, the supremacy of regular law as distinguished from arbitrary power, it is, of course, true that normally, except in times of war, the right of personal liberty in Britain is guaranteed (1) by the writ of *habeas corpus*; (2) by action for damages for imprisonment otherwise than in accordance with law; and (3) by prosecution against illegal restraint. These remedies, though formally open to every citizen, cannot always be availed of by the bulk of the people. They are too poor to have recourse to the judicial processes which involve considerable expenditure and loss of time. Besides,

even when they may fight for their personal liberty in courts of law, the judges or magistrates, despite their solemn oaths of impartiality, find it difficult, partly for their social affiliations and partly for invisible pressure of the State machine, to adjudicate upon conflicts between a poor man and a rich man, or between a private citizen and the State, in a spirit of judicial detachment and without regard to the consequences of their decisions on the recognised social norms. I mean no reflection on the judges or any judicial officers. They are social beings and as such they cannot detach themselves from the prejudices and sympathies and inhibitions of the class to which they belong; and it is a class to whose amenities and securities the bulk of the citizen body have no access. The utmost one may expect from them is pity for the harrassed poor fellow, and no more than pity.

The supremacy of the law, yes. But what does it mean? If it means that nobody shall suffer in body or in goods except in accordance with law, then it is not peculiar to Britain. All civilized States have accepted this principle. Law may be statute-law, order passed by a competent administrative authority, decision of a court or tribunal, or custom. In each of these cases the sanction comes from the State which is the dominant class politically organised and in command of enormous coercive power. What, however, Dicey understood by law is law as passed by Parliament in the exercise of its sovereignty, or as interpreted by regular courts and not any other kind of law. Evidently he left out of consideration the vast body of legal forms and procedures which even in his time formed an important part of the judicial or quasi-judicial apparatus. These are no more 'arbitrary' than the 'regular law'. But does not the supremacy of the law, whatever its source, mean, in the event of a conflict between two unequal persons or between a private citizen and the State, the supremacy of the dominant class that makes the law and determines the process or the procedure of its application?

The issue is not one of the supremacy of the regular law over the arbitrary power, or of judicial finality over

executive discretion. It is, on the contrary, one of conformity of law to social needs, of free and unfettered access to the seats of power and authority on the part of the vast majority of the people, and of the liquidation of those forces that make inequality the basis of the organised political life. Dicey had posed a problem, but had not canvassed its right, correct and scientific solution. He had looked, with reverential awe and in due solemnity, at the surface of things. He had not gone deep down to the roots of the problem which an unresolved social conflict has created.

With regard to the second point, namely, equality before law, it is admitted that other things being equal, the English law makes no distinction on principle between one person and another. But things are not equal. It is absurd to think that an ordinary English citizen has the same advantages in society as the Prime Minister of England, or that even the latter, upon a long view of things, has the same capacity for good or evil as the manipulator of the Stock Exchange or the monopoly capitalist. A wealthy accused is not, in fact, accorded the same treatment by the court as is accorded to a proletarian accused, nor is it general practice that like amenities or immunities are enjoyed by all classes of convicted persons. Differential treatment is arranged or provided for with reference to wealth, status and rank in society.

By the procedures connected with prosecution and defence in criminal law and by the elaborate legal processes, both in civil and in criminal law, poverty is frequently made a casualty. So does the system of bail for undertrials lay bare, in many a case, the inherent injustice of the codified law as well as of the principles of equity and good conscience. The power of the purse is far more effective than the majesty of the law. Money as a medium of exchange tends, in bourgeois society, to turn law and justice into a commodity; for evidence is bought and sold, competent legal advice is prohibitive for most men and, apart from individual cases of corruption, the administration of justice must make no departure from the recognised class pattern

of values. From the melancholy meanness of the pedlar to the pampered profligacy of the pirate you have every shade and variety of the ethics of commodity exchange, determining and regulating the juridical superstructure of an unequal society.

It is not, it is suggested, merely in this general sense that Dicey used the expression 'equality before law'. What he had in mind, it is pointed out, is that an English official, unlike his French counterpart, was subject to the same rules as a private citizen. In other words, nothing like the French *droit administratif* was tolerated in England. There is, of course, substance in this contention, but only up to a point.

13. The French Droit Administratif

The question now is, what is *droit administratif*? What, again, is the machinery of its operation? Where does it differ from the English system? In France and in certain countries of the European Continent where *droit administratif* prevails, the law, in the first place, exempts from the jurisdiction of the ordinary courts of law the servants of the State acting or purporting to act in their official capacity. In the second place, relations of private citizens with these public servants or the Government, arising out of their mutual duties and obligations, as well as the procedure for enforcing those relations, are governed by special rules. These special rules, in the third place, are administered and interpreted by special tribunals, known as administrative tribunals. It is clear that speciality attaches alike to the substantive law and the rules of procedure.

At the top of this special machinery in France is the Council of State, called in that country the *Conseil d'Etat*. Starting as a purely administrative body, designed to remove judicial control over the Administration and its wide range of activities, the Council has gradually become judicial in character and composition, although the members hold office during the Government's pleasure. Should an ordinary court feel that a case canvassed before it involves administrative law, that is, the rights and obligations of the

State or any of its servants, then it must forthwith refer it to the Council for decision.

If, however, doubt arises as to the specific character of the case, what is the final authority to resolve that doubt? Until 1872, the Council decided whether or not a particular dispute or matter involved administrative law and thus took upon itself the responsibility of determining the area of its own jurisdiction. A conflict-court, otherwise known as the *Tribunal des Conflicts*, was, however, established in that year, whose function it was to decide the questions of the conflict of jurisdiction as between the ordinary courts and the administrative courts. This conflict-court consists of nine members, including the Minister of Justice who is *ex officio* President. Three members are elected by the judges of the Council of State from amongst themselves. Three members are elected by the judges of the Court of Cassation, also from amongst themselves, this court being the highest regular judicial body in France. Two members are elected by the above-mentioned six members. The membership is usually for three years and members are eligible for re-election. The Minister of Justice does not, as a rule, attend the sittings of the Court. He does so in the case of a tie, and exercises his casting vote. A Vice-President, elected by the Court from among its members, usually presides over the sittings.

It is wrong to assume, however, from the nature of the composition of the Council of State, its area of jurisdiction and its functions, that it is a law unto itself or that it adheres to no procedure at all. It may be a special branch of law; its procedure may be different from the established rules of English procedure. Nevertheless, the French system is subject to law and procedure as every other civilised judicial system is. It determines legal questions in accordance with certain principles embodied in rules of law. It goes by precedents as courts in 'democracies' do. The Council of State and the other administrative tribunals, of course, are more directly associated with the administration than the ordinary courts. But all the same, they are courts and adjudicate upon issues in a judicial way.

14. Judicial, Quasi-Judicial and Administrative Decisions

What, then, is adjudication in a judicial way? What, in other words, is a judicial decision? According to the Committee on Ministers' Powers, appointed in Britain in 1929, in the wake of the fierce controversy raised by Hewart, a judicial decision presupposes the existence of a dispute between two or more parties and is specially marked by (1) the presentation of statements by the parties; (2) the ascertainment of facts by evidence; (3) the canvassing of legal arguments where the dispute is a question of law; and (4) a decision in accordance with the law of the land. No dispute, in the opinion of the Committee, is involved in a purely administrative decision, but an administrative decision becomes a quasi-judicial decision should it at some stage or other reveal some judicial characteristics.

A quasi-judicial decision, like a judicial decision, presupposes the existence of a dispute, and does not necessarily call for the canvassing of legal arguments, but is characterised by administrative action on the Minister's responsibility. Whether this triangular classification of decisions into judicial, quasi-judicial and administrative decisions, as suggested by the Committee, is warranted by relevant facts is a question one need not investigate in the present context. Perhaps it is not. But if their characterisation of a judicial decision is taken as one's guide, then there is no doubt that the French Administrative Tribunals are courts in the accepted sense of the term, and that the decisions they pronounce are of a judicial character.

It is not to be supposed, however, that there is no difference between the British system and its Continental counterpart. In Britain, except to a limited extent in the matter of the enforcement of military law, the jurisdiction of the ordinary courts extends alike to private citizens and the State and its servants. Even as regards the question of military law, the Queen's Bench Division is competent in certain circumstances to issue any of the three appropriate writs of *habeas corpus*, *certiorari* and *prohibition* to any inferior courts, including military tribunals.

In a broad sense, a writ from the Division may be construed as applying to an inferior court not only in cases where the latter has exceeded its jurisdiction, but also where it is found to have failed to observe the principles of natural justice. But the Queen's Bench Division has been generally reluctant to exercise its writ jurisdiction in the latter category of cases, thus drawing a clear line of distinction, as in the case of *Heddon v. Evans* (1919), between (1) acts done by a military tribunal maliciously or without reasonable and probable cause, and (2) acts done in excess of jurisdiction. The expression 'excess of jurisdiction', against which the Court normally applies the writ now, includes the application of military law to persons not subject to that law, misuse of the law by punishing without regular trial, and inflicting a punishment which a military tribunal is not empowered to inflict. In such cases the officers concerned are liable to an action for damages, or criminal proceedings for assault, manslaughter or murder.

It must be clearly understood that in Britain a member of the armed forces, subject to military law, is at the same time subject, like a private citizen, to the ordinary law of the land. In times of peace all serious crimes, committed by a man of the army, navy or air force, come, as a matter of practice, within the purview of the ordinary courts. Such serious felonies as murder committed by him in Britain are dealt with by the Assizes or the Central Criminal Court. Outside Britain, too, for such an offence he is not triable by a court-martial, unless it is committed on active service or more than one hundred miles from the seat of a competent civil court. The superior jurisdiction of the civil court is underlined by the rule that while a member of the armed forces, though sentenced or acquitted by a military tribunal, may subsequently be tried by civil court, in appropriate cases, once acquitted by a civil court, a court-martial cannot try him in respect of the same offence. On the principle that no person shall be punished for the same offence more than once, the civil court must, however, take into consideration the sentence of the court-martial in awarding punishment in any relevant case.

15. The Liability of the Crown and its Servants

The immunity of the Crown from liability in tort, which applied for centuries not only to acts of Ministers and Departments of State, but also to those of petty servants of the Crown, has been withdrawn by the Crown Proceedings Act, 1947, mainly in accordance with the recommendation of the Committee on Ministers' Powers to the effect that some step should be taken to fill 'the lacuna in the rule of law'. Prior to the changes brought about by that Act no action lay against the Crown for breach of contract. It could not be sued in respect of civil wrongs expressly authorised by it or committed by its servants in the course of their employment. The Crown could not, by contract, hamper its future executive action, and this rule prevented any of its servants from suing the Crown for damages for wrongful dismissal. All these rules flowed from the doctrine that the King can do no wrong, the relatively modern statutory text thereof perhaps being 'during the pleasure', when applied to the tenure of the servants of the Crown. Notwithstanding the elaborate nature of the immunity a Petition of Right could, however, be brought to recover damages for breach of a contract made on behalf of the Crown, or to recover property which I had passed into the hands of the Crown. In certain cases, it was also open to the aggrieved party to sue the actual wrong-doer, and not the Crown, and in fact, though not in law, the Crown acted in accordance with the judgment obtained by the party.

The scope of the Crown Proceedings Act may now be briefly explained. First, the claim of any person against the Crown may now be enforced, as of right and without the fiat of the Queen, by proceedings taken against the Crown for the purpose. Secondly, the Crown is subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject, in respect of (a) torts committed by its servants or agents; (b) any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and (c) any breach of the duties attaching at common law to

the ownership, occupation, possession or control of property. Thirdly, the remedy by the Petition of Right is abolished, and the proceedings by and against the Crown have been assimilated, as far as practicable, to ordinary civil proceedings. No longer is the Crown a privileged authority in the eye of the law or before the courts. No longer is it immune like an individual or a corporation from the common law responsibility and liabilities. If doctors or dentists under the National Health Insurance Service by their negligence injure a patient, the State is liable to pay damages. Similarly, if inspectors holding local inquiries make defamatory statements, the aggrieved party may claim damage from the State for slander. The State's liability arises only when these officers act or purport to act in their official capacity.

Doubt exists, however, as to the liability of the State in the case of officers exercising their executive powers oppressively or spitefully. Nor do the provisions of the Act take away the immunity of the Crown in respect of (a) anything done or omitted to be done by a person discharging or purporting to discharge any responsibility of a judicial nature vested in him; and (b) anything done or omitted to be done in relation to a postal packet or a telephonic communication by a servant or agent of the Crown. Again, nothing done or omitted to be done by a member of the armed forces while on duty subjects him or the Crown to liability in tort for causing the death or personal injury of another person, being himself a member of the armed forces on duty or, though not on duty as such, being at the material time on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the Crown's armed forces. Further, even where the immunity has not been taken away, no greater liabilities attach to the Crown than those to which it would be subject if it were a private person or local statutory authority. Lastly, the Crown Proceedings Act does not apply to proceedings by or against the Queen in her private capacity, nor does it authorize proceedings in tort to be brought against Her Majesty.

In regard to matters such as the defence of the realm, the maintenance of the armed forces and of the postal and telephonic services, the Crown's special powers and responsibilities are recognised by or under the Act so that equality before the law between the State and its servants, on the one hand, and a private citizen, on the other, breaks down in the British 'democracy', no less than it does in what are called totalitarian States. It is significant that although the Crown is normally required to make discovery of documents and to produce them for inspection and to answer interrogatories in any civil proceedings to which it is a party, the Act does not destroy the rule which in any given case, authorises, in public interest, the withholding of any document or the refusal to answer any question.

16. Acts of State

While on this subject, a brief reference to 'Act of State' seems necessary. It is admitted that the plea of 'Act of State' by itself given no protection in Britain to a Crown's servant charged with an unlawful act. To meet any emergency what is done is (1) that the Government obtain through parliamentary legislation greater powers than the law normally allows, as under the DORA; and (2) that appropriate legislation with retrospective effect is secured, such as Indemnity Act, to legalise measures otherwise illegal. No servant of the Crown, it is further conceded, can claim, in normal times, immunity from the due process of law on the plea that his act is that of the sovereign power unless it comes within the prerogative or statutory powers of the Crown. In a conflict between the prerogative and the statute law the latter prevails to the extent of conflict, as was ruled in the famous case of *Attorney-General v. De Keyser's Royal Hotel* (1920), but the English courts recognise the existence of the prerogative in matters where it has not been destroyed.

In a wide sense, the expression 'Act of State' means an executive act which reflects the policy of the State in its relations with a foreign State. In a way, such an act is not subject to the jurisdiction of a municipal court. By this

process the Crown may acquire title to property as a result of cession or annexation of territory, and the title must be recognised at municipal law. Should it, however, deprive a British subject of his existing rights, the treaty of cession or the act of annexation cannot be enforced without the sanction of a parliamentary statute.

In a technical sense the plea of 'Act of State' may be used in defence of an action brought against a Crown's servant by a citizen or national of a foreign State for injury done to the latter or to his property. But it may be availed of only if the act complained of had been committed on foreign territory and, if not previously authorised, was subsequently ratified by the Crown. This defence is not effective against (1) a British subject, as was held in the case of *Walker v. Baird* (1892) ; or against (2) a friendly alien resident in British territory, as was held in the case of *Johnstone v. Pedlar* (1921). Apart from the provisions of law or the rulings referred to above, a whole series of statutes, as for example, the Public Authorities Protection Act, the Constables Protection Act, the Customs Consolidation Act, the Inland Revenue Act etc., have placed the servants of the Crown and other public servants in Britain in a position of vantage as compared with the private citizens.

The law and custom give special protection to members of Parliament, of the judiciary and of the services of different grades so that each one of the three branches of the Government enjoys immunities, more or less extensive, which are not accorded to persons outside the charmed Government circles. Dicey's rule of law, in its second aspect, is thus negatived in so far as a servant of the Crown is authorised to act with a certain measure of immunity in his relations with a private citizen.

There is substance in Dicey's third proposition, that is, that "the constitution is the result of the ordinary law of the land," in so far as there are constitutional rules and conventions which have not been created by statutes. But it is not to be denied at the same time that a considerable part of the law of the land owes its origin to parliamentary legislation also. What is peculiar to Britain is the supremacy

of Parliament which had ensued primarily as a result of political struggle, and was then recognised as law sanctioned alike in practice and by statute. The rights of individuals, over which Dicey waxed so eloquent, have been altered, amended and adjusted by statutes and orders to suit modern conditions. Whether these alterations, amendments or adjustments have or have not succeeded in easing the tension of conflict and stabilising the basis of the State is, of course, another matter.

17. New Social Categories

Authorities have been created in the course of the last fifty years by agreement between the major political parties, which exercise such wide discretionary powers as would puzzle and confound a nineteenth century Whig or an eighteenth century Tory. Questions of conflict between labour and capital, of public ownership and management, of planning and rationalisation, of control and price-fixing, and similar other questions, which the State is now required to tackle, have struck at the roots of the familiar conceptions of Dicey and the other nineteenth century exponents of the philosophy of capitalist complacency. In the process more and more new laws are made which, in their turn, detract from the old norms of constitutional ethics, or create new social categories.

What is more important, to say that the constitution is the cause or the effect of the rights of individuals is to take a rather pedantic view of a complex social problem. Rights and wrongs grow out of the class conflict. Take the long struggle for supremacy between the personal monarch and the landowners in the thirteenth century. In the wake of this struggle came a new code of social and political ethics. Take the Revolution of 1688. From it emerged certain social and political norms that have come to be recognised as the basis of the theory of English democracy. Take, again, the gradual transformation of British colonial rule. From time to time certain colonies had been raised to the status of Dominions, and a British statute was enacted in 1931 to register that transformation. During the Second

World War neutrality on the part of a Dominion was acquiesced in, though reluctantly and with grave misgivings. And now you have the curious spectacle of a Commonwealth State inside a hereditary Christian monarchical system solemnly declaring itself a sovereign-democratic Republic and its neighbour, another Commonwealth State, calling itself an Islamic Republic and reserving the exalted office of Head of the State for one from amongst the faithful.

In certain circumstances convulsions take place, which sweep away the democratic illusion of the sanctity of the constitution or the eternal category of law and order. Sometimes the movement is imperceptible to the undiscerning mind and invisible on the surface. But society is not at a standstill. If it is, it begins to decay and disintegrate. Society is dynamic. Whether in consequence of convulsions or imperceptible and invisible movements changes come about, changes in social relations. Sometimes they bring productive relations into conformity with the forces of production. More often, they take the shape of expedients or contrivances, whereby the social breakdown is sought to be averted. All these changes or adjustments are reflected in the conception of rights and wrongs, in the laws and ordinances and, finally, in what is called the constitution of the land, whether written or unwritten, or of composite texture.

Commenting on Dicey's theory, Jennings writes that both powers and rights come from the law, from the rules. Apparently it is in reply to Dicey's thesis that the powers of the Crown and the other State organs are limited by the rights of individuals. If Dicey took comfort from rights in abstraction, Jennings apparently sustains himself by the illusion of the supremacy of law. What, then, is the difference? Dicey himself started with 'the supremacy of law'. Who makes and unmakes law? Why is law mad and adapted and repealed? To be sure, it is not the 'general will', that ordains and prohibits. It is not 'public good' that gives powers and creates rights. The sanction of all law is ultimately the necessity of the dominant class, which, in initial stages of conflict, is sought to be sustained by ideological chatter, and, in acute crisis, is backed up by force.

CHAPTER V

SEPARATION OF POWERS

I. From Monism to Trinity

Side by side with the doctrine of the rule of law, that of the separation of powers has for a long time exerted an enormous influence on the writings of a certain school of political thinkers in Europe and America. The theory was mainly Montesquieu's formulation and, like Locke, Montesquieu had drawn upon his knowledge of the British system of government in building the foundation of his theory. He thought that the concentration of powers in one individual or in one single State organ led to tyranny and despotism, whereas by the delicate mechanism of checks and balances the separation of powers ensured freedom and democracy. In the light of his experience of the British system Montesquieu divided the powers into legislative, executive and judicial. He persuaded himself that this division was calculated to serve a double purpose: the purpose, first, of stabilising the State machine; and the purpose, secondly, of guaranteeing to the individual a sense of his effective usefulness in the organised political community. To him, there would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, (1) that of making laws, (2) that of executing those laws, and (3) that of trying the crimes of individuals.

Locke argues that the legislature could not transfer the power of making laws to any other authority on the well-known maxim *delegatus non potest delegare*, which means that a delegated authority could not be re-delegated. While defining the doctrine of separation Blackstone stated that whenever the power to make and to enforce the law was in the same man or in one and the same body of men, there was an end of public liberty.

The separation of powers sets two apparently opposite forces in motion. By checks, the three organs of Government, separated from each other, seek to work out the purposes of the State through their respective assignments and, in the course of their operations, are forced to keep within limits. By balances, these three organs, functioning in their respective spheres, and consequently made conscious of their own limitations and of the need for cooperation, contribute, by avoidance of extravagance, to the social equilibrium. Checks divide and keep the organs in their proper places, whereas balances draw them together and give them a sense of unity in the achievement of the common purpose. As a matter of theory, it was assumed, however, that the sovereign power of a State sought three different channels of expression of its mind and will, and that they were not only distinct from each other, but pursued their assignments independently. The exponents of the theory thought that it was the way of peace, of security and of freedom.

John Marriott believed that there was no civilized State in which the three functions of Government were not clearly distinguished, and in which each of those functions was not assigned to its appropriate organ. It seems that the accumulated load of ancient lore has such a tremendous effect on those who swear by it that they allow their receptive organs to be dulled and rendered almost inactive in the face of grim problems of life and society. Even such a great British jurist as William Holdsworth could not resist the temptation of oversimplifying the content of the sovereign power by resort to the hackneyed division into three separate and independent categories, namely, (1) the legislature which made the laws; (2) the executive which carried the laws into effect; and (3) the judiciary which enforced the due observance of the laws. It appears nevertheless that he kept his instructed mind wide awake to the complex social phenomena. Later on, after about a quarter of a century of experience based on observation, he came to the conclusion that the doctrine of the separation of powers "has never to any great extent corresponded

with the facts of English Government. He added that it was not true that "legislative functions are exclusively performed by the legislature, executive functions by the executive, or judicial functions by the judiciary".

It is rather astounding that Montesquieu should have allowed himself to be deceived by the British system of Government in the eighteenth century into believing that from the point of view of the separation of powers it was a model. Whatever might have been the developments in the nineteenth century, due in a large measure to expansive capitalism, the functions of the State had not taken definite and concrete shapes in the form of clear-cut categories in the seventeenth and eighteenth centuries. After an interlude of leisurely, quiet and blissful complacency for about half a century or more of the Victorian era the symptoms of social conflict revealed themselves in their naked ugliness in the beginning of the present century, and then the convulsions came in the shape of two World Wars. The entire juridical and ideological superstructure was shaken to its foundations, so much so that the traditional ethics of the game, for example, the rule of law, the independence of the judiciary, the separation of powers and the like have either been completely abandoned or drastically revised.

Writing about the American Government where, by express constitutional provisions, an attempt has been made to demarcate and delimit the functions of the sovereign power, Willoughby observes: "A fundamental principle of American constitutional jurisprudence, accepted alike in the public law of the Federal Government and of the States, is that, so far as the requirements of efficient administration will permit, the exercise of the executive, legislative and judicial powers is to be vested in separate and independent organs of Government." Thus, according to him, the general principle of the separation of powers is subject to "the requirements of efficient administration". What is more, the author admits that each of the three organs of the State exercises, in law as well as in fact, many functions which, by their essential nature, are of a composite nature, being marked by the characteristics of the other two organs.

2. Complete Separation Contrary to Fact

Of course, no modern thinker accepts the theory in the form originally formulated by Locke or Montesquieu, but it is clear at the same time that the criticisms offered or the comments made are, on the whole, formalistic, and show no appreciation of the forces that regulate the working of the State machine. For instance, the British Parliament, which is essentially a law-making body, sometimes discharges functions which are of a judicial nature. Legally, it is within the rights of the House of Commons to impeach persons before the House of Lords, although the practice has, in modern times, become obsolescent, if not absolutely obsolete. The House of Lords may try peers charged with treason or felony, and is a court of appeal in civil and criminal matters for the United Kingdom. Each House, again, can punish any person found guilty of a breach of its privilege. In our country Parliament and the State Legislatures enjoy *mutatis mutandis* powers and privileges analogous to those of the British House of Commons, pending appropriate legislation. Parliament has power to impeach the President and to remove him from office in accordance with a procedure determined by itself. The USA Congress is empowered to determine the qualifications of members, to decide contested elections, and to institute proceedings against private individuals for contempt. Legislatures exercise executive functions also, for instance, the maintenance of law and order inside the Chambers, the appointment, dismissal, promotion etc. of the officers of the Houses and, in the USA in particular, participation in the appointment of the Supreme Court Judges, Ambassadors etc., and in treaty making.

The courts, especially the superior courts, in their turn, possess law-making as well as executive powers. They make rules as to the admission of advocates, their professional conduct, the constitution of bench, the procedure of filing petitions and appeals etc. In the executive sphere in our country the Supreme Court and the relevant State High Courts participate, though in an advisory capacity, in the selection of their judges. The

High Courts have control over district and subordinate courts, including the posting and promotion of a certain class of the members of the judicial service. Every High Court exercises superintendence over all courts and tribunals within its territorial jurisdiction, except the military courts or tribunals.

Coming now to the executive, the first point that strikes one is that in the familiar legal or lay jargon the Queen in the United Kingdom, the President of the USA or the President of India is the head of the executive. 'The head of the State' is, to my mind, a better and more appropriate expression, having regard to the position of each in the State machinery. About the composite role of the British Queen, or of the President of India, as a legal concept, there is absolutely no doubt. Although in the USA, for some historic reasons, the President forms no constituent element in the composition of the Legislature, unlike the Queen in the United Kingdom or the President of India, he is required, in terms of the constitution, to play an important role in the formulation of policy which is reflected in legislation. The constitution requires the President from time to time to "give to the Congress information of the state of the Union, and recommend to them consideration of such measures as he shall judge necessary and expedient". The President has power not only to veto legislation in certain circumstances but to initiate legislation, a power which he exercises in consultation with members of the Cabinet, whom he appoints with the approval of the Senate.

There is an impression even in learned circles, as would appear from a remark made by Mr. Fazl Ali in the course of his judgment on a reference case referred to below, that the US President and his Cabinet have no responsibility for initiating Bills or seeking their passage through Congress. That impression is wrong, although the American procedure, for obvious reasons, differs from the English or Indian procedure. In Britain as well as in India the initiative in regard to analogous legislative processes comes from the Ministers who are members of their respective Legislatures. In the USA no less than in Britain and in

India most of the legislative measures are, however, administration measures in the sense that they are sponsored by the head of the State either directly, as in the USA, or by Ministers as in Britain and in India. In this respect the presidential and cabinet systems of Government tend to converge, and this despite the express constitutional provision in the USA to the effect that all the legislative powers are vested in the Congress.

Apart from the fact that the bulk of the legislation originates in our time in the executive branch and is subject to its control, one must notice that the total of the formally enacted legislative measures is much less in volume and quantity than the mass of subordinate or delegated legislation in the form of orders and byelaws, rules and regulations, which have the force of law. In fact and in law, the administration administers as well as legislates in partial or complete disregard of the theory of separation of powers. There is an unmistakeable tendency towards abdication of their policy-making functions on the part of the Legislatures; and the justification for this tendency is sought, amongst other things, in their lack of expert knowledge of the new and complicated problems with which a modern State has to grapple. We are passing through a period of history in which, it is suggested, what is required is not so much an obstinate adherence to dogmas as a keen sense of realism, not so much a counsel of perfection as an alert anticipation of problems combined with a trained skill of blending diverse interests.

3. The Growth of Administrative Law

This brings one to remarkable developments that have taken place during the last fifty years or more in connection with the functions of the executive in the 'democracies'. These are (1) the exercise, in terms of delegation, of law-making powers by ministers, departments of the administration or administrative officials; and (2) the accretion of judicial functions to bodies or persons other than regular courts of law. Thus a vast body of what may appropriately be called administrative law is growing, though not precisely

in the sense in which it is understood in France. Not that in earlier times no legislation had been enacted by the executive, or that no judicial functions had been exercised by them. But in the years between the stabilisation of the bourgeois forms of social relations and the emergence of crisis due to their inadequacy a kind of institutional demarcation was evolved, which sought to draw a rough boundary line between and among the three familiar instruments of the State. That institutional demarcation, which to a certain extent characterised the British system and its American counterpart, is challenged, if not completely subverted by the new developments in the public law of the 'democracies'.

In conferring law-making powers on the administrative agencies or officials the legislature adopts different methods. First, it passes an Act, in broad terms, empowering the relevant body or department to make rules for the purpose of carrying out the intention of the parent legislation. Sometimes that body or department is given power to make orders having the force of law with reference to the subject matter of the statute and, in some cases, to amend or vary the express provisions of the enacting Act itself.

The provision empowering an extraneous body or authority to modify or vary the Act has often been called in England "Henry VIII Clause", being a symbol of executive autocracy or administrative lawlessness. That device, according to Thomas Carr, is partly a draftsman's insurance policy, in case he has overlooked something, and is partly due to the immense body of local Acts in England creating special difficulties in particular areas. This kind of subordinate legislation is, of course, subject to judicial review on the principle that the agencies or individuals concerned must not legislate in excess of the statutory authorisation, or that the orders and rules must conform to the main outline of the Act.

Secondly, the legislature provides that the rule or order shall be laid before it for a certain number of days and, if it is disapproved by resolution, shall be annulled. Thirdly, it empowers the relevant minister to make such orders as he may think necessary or expedient. This means that the

exercise of discretion by the minister in this regard is indirectly excluded from the jurisdiction of the court. Fourthly, it enacts that the decision or order of the minister shall be final and conclusive, so that any possibility of a judicial review is completely ousted. Fifthly, the provision is inserted to the effect that an order made or a decision taken by the minister is not subject to appeal to any court. Sixthly, for the identical purpose of excluding judicial review, it is enacted in the enabling statute that the rule or order made by the minister shall take effect "as if enacted in the Act". If the Act is subject to judicial control, then the rule or order shall also be subject thereto. Where, on the other hand, the court has no power to challenge and nullify the Act the same immunity is enjoyed by the rule or order. Lastly, the statute provides that the confirmation by a departmental board of an action taken by a local authority shall be conclusive evidence that its requirements have been complied with, and that the action has been duly taken and is within the limits of the law. These or like provisions are made in modern legislation in the United Kingdom as well as in the rest of the 'free' world, including our own country.

The arguments usually put forward in defence of these different forms of subordinate or ancillary legislation are (1) that the legislature cannot but delegate its legislative power in certain respects because it has no sufficient time at its disposal; (2) that even if it had the time, it has not the requisite aptitude for the work involving highly technical issues; and (3) that because the task to govern the country ultimately devolves not on the legislature but on the executive a procedure, adequate to the requirements of a good, stable and strong government, must be taken, irrespective of its consequences to the relations between the legislature and the executive.

4. Developments in India

The Indian statute-book abounds with numerous examples of these different kinds of subordinate, delegated or ancillary legislation. Besides, after the pattern of the

British regime in India the constitution of 1950 has conferred upon the President extensive law-making powers both in normal circumstances and in emergencies. It is assumed that these powers are exercised by him on the advice of his Council of Ministers. In practice, though not in theory, these are Ministerial powers. The Governors of States are also empowered to promulgate, presumably on the advice of Ministers, ordinances during the recess of the appropriate legislature.

It seems pertinent in this connection to take up the issues arising out of a reference (1951) made to our Supreme Court by the President under article 143 of the constitution regarding the validity of certain provisions of the Delhi Laws Act, 1912 ; the Ajmer-Marwara (Extension of Laws) Act, 1947; and Part C States (Laws) Act, 1950. Before they are examined it is necessary, incidentally, to point out at the very outset that unlike the statutes enacted by the legislatures under written constitutions such as those of India and the USA, which are subject, within limits, to judicial construction, no question arises as to the constitutionality or otherwise of a statute passed by the British Parliament. In Britain only subordinate, ancillary or delegated legislation may be challenged with or without effect in a competent court of law. The reason is obvious. The supremacy of the King-in-Parliament has no limits set by any constitutional provision, rule or law.

Now, the issues raised in the aforementioned reference were framed in these terms :

1. Was section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Legislature which passed the said Act?

Section 7 runs thus: "The Provincial Government may, by notification in the Official Gazette, extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof, any enactment which is in force in any part of British India at the date of such notification".

2. Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Legislature which passed the said Act?

Section 2 runs thus: "The Central Government may, by notification in the Official Gazette, extend to the Province of Ajmer-Merwara with such restrictions and modifications as it thinks fit, any enactment which is in force in any other Province at the date of such notification."

3. Is Section 2 of the Part C States (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Parliament?

Section 2 runs thus: "The Central Government may, by notification in the Official Gazette, extend to any C Part State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

No unanimous opinion was expressed by the Supreme Court and tendered to the President. The majority of the Bench, however, held the Delhi Act and the Ajmer-Merwara Act in their entirety constitutional and valid. The same view was taken by them with regard to section 2 of the Part C States Act, except for the concluding sentence beginning with "and provision may be made" and ending with "applicable to that Part C State". This part being severable from the rest of the section the remainder was held to be good law.

The principles enunciated in the majority decision are: (1) that normally the legislature must itself discharge its legislative functions, and not through others; (2) that the legislature can do whatever is ancillary to, and necessary for, the full and effective exercise of its power of legislation; (3) that the legislature must not abdicate its functions and create a parallel legislature; and (4) that the

legislature's power to delegate is not prohibited by the constitution except to the extent that the delegation does not amount to abdication and self-effacement.

It is common ground that in Britain the sovereignty of the King-in-Parliament excludes determination by any court of the constitutionality of a parliamentary statute. It is also agreed that for the reason that the British Parliament has not been recognised, in law or in fact, as a body of delegates the well-known legal maxim that a body, that exercises powers by delegation, cannot re-delegate those powers to an existing authority or to a body created by it can have no application. But from time to time doubts had arisen as to the position and powers of subordinate legislatures created by British statutes for India, and of the Dominion Legislatures and the Legislatures of States and Provinces. The issues involved in Indian and Dominion cases as well as in the interpretation of the American constitution were canvassed at great length before the Supreme Court from different points of view.

5. Principles Underlying Subordinate Legislation

Mention was made of the Privy Council decision in the case of *The Queen v. Burah* (1878), where the question arose whether a section of an Indian Act of 1869, which empowered the Lieutenant-Governor of Bengal to determine whether a law or any part thereof should be applied to a certain territory, was or was not *ultra vires*. The Privy Council held that the impugned section was not *ultra vires*. They observed: "Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or Provincial Legislature, they may be well exercised either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the legislature to persons in whom it places confidence, is no uncommon thing, and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature contemplate

this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred."

Following the ruling in this case the Privy Council held a Canadian Temperance Act of 1878 constitutional and valid in the case of *Russell v. The Queen* (1882). The same view was taken by that body in the case of *Hodge v. The Queen* (1883), where the question arose whether the legislature of the Province of Ontario was or was not competent to entrust to a local authority the power to make regulations with respect to the Liquor License Act of 1877, which, among other things, created offences for the breach of those regulations and imposed penalties. Holding that it was competent the Privy Council said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92, as the Imperial Parliament in the plenitude of its powers possessed and could bestow". This decision made two points clear in so far as it was within the Privy Council's competence to do so, namely, (1) that the Provincial Legislature was not a delegate; and (2) that, within the limits of subjects and area, the Provincial Legislature was as supreme, and had the same authority as the Imperial Parliament, or the Parliament of the Dominion, in the matter of entrusting to an existing body or an authority of its own creation power to make bye-laws with a view to carrying out the purposes of the enactment.

It appears that our Supreme Court have accepted, as a general rule of construction, the English judicial view of the delegability of legislative power within limits and of the non-applicability of the maxim *delegatus non potest delegare*. They are of the opinion that the constitution of 1950 has made no material difference from the point of view of substance, but subject to necessary

changes, in the matter of delegation as interpreted in the *Queen v. Burah*.

The founders of the American Government had, however, been greatly influenced by the doctrines associated with Locke and Montesquie and disapproved of the concentration of the State power in the hands of a single organ. These ideas were reflected in many State constitutions which laid down that the three departments of the State, the legislature, the executive and the judiciary, must not exercise the powers of the others. No such prohibition was, of course, explicitly inserted in the federal constitution, but in accordance with the doctrine of separation of powers the federal system soon recognised the principle of nondelegability as part of its public law. The principle had held sway for a fairly long time until the emergence, in the nineteenth and twentieth centuries, of complex economic and social problems due to capitalistic crisis, when it gave way to the inexorable pressure of events. As is pointed out by some judges of our Supreme Court, the result has been that the American Court decisions on the questions relating to delegation consist largely of attempts to disguise the process by 'veiling words' or 'by softening by a quasi'. They quote Professor Cushman's well-known syllogism which puts the matter thus :

Major premise: Legislative powers cannot be constitutionally delegated by Congress.

Minor premise: It is essential that certain powers be delegated to administrative officers and regulatory commissions.

Conclusion: Therefore, the powers thus delegated are not legislative powers. Instead, they are 'administrative' or 'quasi-legislative'.

The ruling in the case of *Springer v. Government of the Phillipine Islands* (277 U. S. 189) was typical of the earlier decisions of the American Supreme Court. In that case it was held that the principle inherent in the American constitutional system was that unless otherwise expressly provided, or incidental to the powers conferred, the respective powers of the three branches of government

must be kept separate. This rule was, however, negated as early as in 1825 in the case of *Wayman v. Southard*, where it was asserted by no less a person than Chief Justice Marshall that Congress "may certainly delegate to others powers which the legislature may rightfully exercise itself." Even the principle of nondelegability incorporated in the constitutions of the States could not be sustained in practice, for in the case of *Stoutenburgh v. Hennick* (1889), it was held that "the delegation by a State legislature to a municipal corporation of the power to legislate, subject to the paramount law, concerning local affairs, does not violate the inhibition against the delegation of the legislative function".

It is not to be supposed, however, that the system of administrative law as developed in the USA has completely destroyed the general rule of prohibition against the delegation of legislative powers. In a large number of comparatively recent cases the delegation by Congress of legislative power to the President has been declared unconstitutional, for instance, in *Panama Refining Co. v. Ryan*, (1935), and in *Schechter Poultry Corporation. v. United States* (1935). But in the State sphere as well as in the Federal sphere the delegation of legislative powers, within limits and subject to certain qualifications, is not ruled out in modern times.

Our Supreme Court seems to have drawn a dividing line between laying down policy or establishing a standard, on the one hand, and implementing that policy or enforcing that standard by appropriate rules and regulations, on the other. The legislature, it is suggested, cannot delegate to any body its power to define policy, or to lay down a standard. What is permissible is the delegation of power to make rules and regulations for the specific purposes of the statute, and in conformity with its provisions. This division sometimes gives rise to confusion not only among the lay public but also in the Bench. It is nevertheless, clear that no longer is the principle of non-delegability, following from the doctrine of the separation of powers, adhered to as a dogma, and it is a general rule that each case should be

judged on its merits and against the background of the social phenomena.

6. Administrative Justice

Now I come to that branch of administrative law, which is concerned with the exercise of judicial functions by individuals or bodies other than the regular courts of law. The typical example of what may be called administrative justice is the decision taken by a minister or the head of a department on questions of a judicial nature in exercise of the power conferred on him by a statute, and which is not amenable to judicial control at any stage. In these cases the decision is sometimes made by a departmental official, who has no responsibility except to his superiors. The minister concerned may or may not be aware of the decision, or of the grounds therefor. Perhaps in the majority of cases he is not, unless, of course, the matter is brought to his attention by the aggrieved party.

The official remains anonymous, and is not bound by any particular procedure, except where rules of procedure are specified by a superior administrative authority or by statute. He is not required to rely on rules of evidence. Even if he cares to receive evidence, he is completely at liberty to disregard it without getting it tested by cross-examination. The aggrieved party may have no access to the official mainly for the reason that the latter is unascertainable and silently operates from behind the scenes, and also for the reason that such access is officially discouraged and disapproved on principle. Even where an oral hearing is permitted, it must, by its very nature, be a closed-door proceeding, from which the public and the press are excluded. No reasons need be given by the official for the decision he may have taken.

This is a proceeding which, even though it involves questions of a judicial nature, is contrary to all rules of procedure appropriate to a court of law. Hewart calls it the exercise of arbitrary power. To him, it is neither law nor justice; instead it is administrative lawlessness, no less repugnant to the French system of administrative

law than to the known rules and principles normally followed by a regular English court of law.

7. The Exclusion of Judicial Processes in India

Take our country. Take preventive detention, a British colonial device which, curiously enough, has not only been retained but has been elevated to a fundamental principle of our public law under the constitution of 1950 (article 22). Any person in India may be arrested and detained under a law providing for preventive detention. For three months nothing may be known about the detained person. He may be put wherever it is the pleasure of the executive to put him. If the executive decides to extend the period of detention to more than three months, it may be done on the basis of a report made by the Advisory Board appointed by the executive. That extension may be indefinite depending, as it does, on the life of the detention law itself, unless meanwhile Parliament enacts a law prescribing the maximum period of detention. Parliament is also competent to prescribe the circumstances under which, and the class or classes of cases in which, the executive may detain a person for a longer period than three months without obtaining the opinion of an Advisory Board.

It is required, of course, that the executive making the order of detention shall, as soon as may be, (1) communicate to the detained person the grounds for his detention, and (2) afford him the earliest opportunity of making a representation against the order. It is not through a familiar and recognised judicial proceeding that the relief contemplated is to be sought by the detained person. From beginning to end the whole thing is an administrative process. The judiciary has no right to challenge the principle of preventive detention, however monstrous it may be from the point of view of the rule of law or of the principles of natural justice, for it embodies a policy, a rule of conduct, a category of personal liberty which has been enshrined in the constitution. It cannot set aside a law of preventive detention if it conforms to the constitutional provisions. It is not competent to nullify an

executive order if it has not overstepped the limits of the appropriate law.

In the case of *Bhim Sen for R. S. Malik Mathra Das (detenue) and others v. The State of Punjab* (1951) our Supreme Court have held (1) that instances of past activities of a detenue are relevant to be considered by the authority making the order of detention as a test of his likely future activities; (2) that reference to such past activities in the grounds communicated to the detenue is quite in order; (3) that whether they are sufficient grounds or not is not for the decision of the court; (4) that the subjective satisfaction of the authority making the order is sufficient to put the order beyond any judicial challenge; (5) that the setting up of an Advisory Board does not take away the executive discretion or destroy the subjective test; and (6) that it is not for the court to decide whether the subjective decision of the authority making the order is right or not.

Again, the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to Parliament and the Legislatures of States and of elections to the offices of President and Vice-President, are vested in the Election Commission (article 324). The Election Commission is an administrative body; in any event it is not a regular Court of law. The appointment of election tribunals for the decision of doubts and disputes, arising out of elections to Parliament and the Legislatures of States, is likewise vested in the Election Commission. No election to either House of Parliament or to either House of a State Legislature can be challenged in a Court of law. Decisions on doubts and disputes are required to be taken by the election tribunals appointed by the Commission, and at no stage of the proceedings does even the Supreme Court or the High Court come into the picture at all, let alone the subordinate Courts. Only where there is a clear case of excess of jurisdiction on the part of the Commission or of a tribunal, may relief be sought through an appropriate writ. The law regarding 'election' as embodied in Part XV of the Indian constitution and in the Representation of the

Peoples Act, 1951, and various amending Acts enacted by Parliament, follow, like many other constitutional and other provisions, the pattern set in British India in accordance with the relevant British statutes. It is significant that the courts in India, including the Supreme Court, make copious references to these pre-independence laws and the British decisions in dealing with issues canvassed before them.

In the case of *N. P. Ponnuswami v. The Returning Officer, Namakkal Constituency, Salem District, and four others* (1952), the Supreme Court have held (1) that the word 'election' is to be construed as embracing the several stages and the entire process leading to the final declaration of results of an election; (2) that the High Court's jurisdiction under article 226 is excluded in regard to matters provided for under article 329, which covers all 'electoral matters'; and (3) that 'election' cannot be challenged before any court other than an election tribunal, whose decision is final and conclusive. There are, however, two points which should be borne in mind in this connection. First, all doubts and disputes regarding the election of President or Vice-President, as distinguished from those arising out of the elections referred to above, must be enquired into and finally decided by the Supreme Court, the Election Commission or the tribunals having no locus standi in this respect (article 71). Secondly, questions, arising out of the disqualifications of members of Parliament or of the State Legislatures, are disposed of respectively by the President and the Governors or Rajpramukhs, as the case may be, in consultation with the Election Commission, and in accordance with the advice tendered by it (articles 103 & 192). This, again, is an administrative proceeding, which is not, at any stage, subject to judicial review.

I need not detain you long over this aspect of administrative law (administrative justice) by examination of the detailed provisions of various statutes, enacted during the British colonial regime or since the transfer of power in 1947, and authorising adjudication on the issues of a judicial character by Government officials, official bodies or tribunals. Reference may, however, be made to the tax

assessments and the processes through which they are determined; the settlement of industrial disputes by conciliation officers, boards and tribunals, and the circumstances in which their decisions or awards may be contested on appeal; and the special tribunals created for the trial of persons charged with offences of a particular class or classes or in a particular area or areas. In some instances the jurisdiction of regular civil courts is ousted, while in others there is provision for appeal to the High Court on questions of law only. At a certain stage of the proceedings or in certain cases the known rules of judicial procedure are, of course, followed in accordance with the statutory directions. It is clear nevertheless that in important respects these officials, boards or tribunals are not courts of law in the ordinary sense of the expression.

8. Administrative Justice as a regular instrument of Government

The tendency toward this pattern of adjudication is today an unmistakable fact. It grows and spreads in India as in the other 'democracies'. For the developments in Britain there is exhaustive treatment of the subject by Robson in his book entitled *Justice and Administrative Law*, although it is not to be assumed that I agree with him in all that he has cared to place on record. In Britain certain principles were enunciated in their recommendations by the Committee on Ministers' Powers referred to earlier in this book. The Committee, it may be recalled, were directed "to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law." In considering the recommendations of the Committee one must not forget the limited scope of the terms of reference, limited by insistence on adherence to what, in Hewart's view, are the two abiding principles of the English constitution.

The Committee's recommendations may be briefly stated. First, if a statute is in general concerned with administration, its execution should be entrusted to an executive department. If, on the contrary, it is one in which 'justiciable issues' are likely to be raised in the course of carrying it into effect and truly 'judicial determination' is needed in order to reach decisions, then the 'justiciable' part should be separated from the rest and left for decision by a court of law, ordinary or specialised. Secondly, except on special grounds purely judicial functions should not be entrusted by Parliament to ministers or to tribunals set up by ministers. Thirdly, where exceptional circumstances justify the assignment of judicial functions to administrative or executive authorities, a ministerial tribunal is preferable to a minister for the exercise of such functions. Fourthly, where judicial or quasi-judicial functions are exercised by ministers or other judicial functions by ministerial tribunals, the High Court must have power to prevent the excess of jurisdiction. The aggrieved party must have the right of appeal to the High Court on a question of law, and regard must be had by the ministers or ministerial tribunals for the principles of natural justice. The Committee rejected the proposal for a regularised system of Administrative Courts and Administrative Law as involving the abolition of both the supervisory and appellate jurisdiction of the High Court in matters pertaining to administration, and being opposed to the principles of the English constitution.

In the USA regulatory boards and commissions create standards and promulgate rules and regulations having the force of law. They hear and decide cases in accordance with the recognised judicial procedure. As a rule, appeal lies from such decisions, not of course, on questions of fact, but only on grounds of excess of jurisdiction and of nonconformity to law. Boards and commissions of this kind are frequently called Administrative Tribunals. By their impact on the separation of powers and on the social norms of the country these bodies have introduced a vast change in the American political and social scene.

Some commentators have divided the history of American constitutional development into three periods "from the standpoint of shifts in institutional balance". The first period, roughly covering the years between 1789 and 1861, was marked by legislative leadership, which must not, however, be confused with the English doctrine of the sovereignty of Parliament. The legislature, and not the executive, whether elected or appointed, symbolised the popular hopes, wishes and aspirations. Opinion was, on the whole, distrustful of the power of the executive partly because during that period the social contradictions were sought to be tackled by an apparent conflict between the legislature and the executive and partly because of the legacy of hatred against the English Government whose power the leaders and organisers of the rebellion had liquidated.

Soon the friction occurred between the President and Congress, and it was felt that unless something was done to remove the cause of this recurring friction the stability of the entire structure of the State would be jeopardised. The power began to shift, on an increasing scale, to the judiciary as a sort of arbitrator between the indefinable idealism of Congress and the articulate realism of the President. Thus the second period, extending from 1861 to 1890, was marked by the growing influence of the Supreme Court. It looked, as if, across the Atlantic, they had substituted the New England supremacy of the judiciary for the old England supremacy of Parliament. In the wake of the adoption of the Fourteenth Amendment the Supreme Court started playing the role of the super-legislature, declaring laws enacted by Congress unconstitutional and void.

From 1890 the third period commenced with the passage of the Sherman Anti-Trust Act, a period of contradictions at home and challenges abroad, of the organised resistance of the productive relations to the creative call of the forces of production, and in short, of capitalism in crisis. It is a period marked by executive leadership and federal centralisation, which are forcing Congress and the judiciary as well as the States to rest content with secondary roles in the moving social drama.

"Get the job done", it is claimed, has become a categorical imperative. That indeed is true, but what is the 'job'? What is left unsaid and unrevealed is, perhaps, that the 'job' is to save the dollar at all costs and by all means, that is, if need be, by depressions, booms and wars, following the cyclic order in continuous succession. To this gigantic task neither the legislature nor the judiciary is equal, because the first is a rotten 'talking shop' and the second is a lazy and ponderous body of superannuated wiseacres. So the hope is centred on the executive who, more than any branch of the Government, have come to control the coercive apparatus of the machine. This explains the growth and expansion, in our time, of administrative law and administrative justice in all bourgeois States. It is not a freak of nature, nor is it ordained by the mystic 'general will'. History is often classified into periods, but it is in essence a continuous process, an unbroken unfolding of phenomena and events which from time to time determine the shifts in emphasis.

9. Advantages claimed for the System

Several advantages are claimed for administrative tribunals, for instance, (1) its cheapness as compared with the machinery of regular courts; (2) the rapidity with which they normally work; (3) the special experience and "the know-how" technique which they bring to bear upon the settlement of complicated economic and social issues; (4) the assistance they render to the efficient and orderly conduct of administration by the flexibility with which they are able to discharge their functions; and (5) their adaptability to the requirements of social policy in disregard; if need be, of the hindrances of past decisions and outmoded rulings. If these are the reasons, as it is suggested they are, why are administrative tribunals preferred to the regular courts of law? I do not see why the latter cannot be so reconstructed as to fit in the new institutional pattern. If really justice can be had at cheaper cost from an administrative tribunal, it is possible to make the regular judiciary less costly than it is today. If speedy justice comes from the administrative warehouse, why not make the judges a little

more alert and a little more quick in the disposal of cases and suits ? If the judges possess no technical knowledge, men and women adequately equipped with that knowledge may be put on the Bench. If they are not responsive to modern social needs, surely they are not earning their salaries despite their massive lore or immaculate integrity. Indeed the suggestions and insinuations contained in this familiar line of argument in defence of administrative tribunals reflect no credit on the judiciary, and it seems that its exponents simply do not know what they talk about.

Speaking about justice between man and the State Alfred Denning contrasts the English law with the French *droit administratif*, and admits that the latter affords the individual better protection than the English system in some respects. In France, for example, an administrative court holds that, if anyone in a munition factory is injured by an explosion, the risk falls on the State whereas, by contrast, an English court holds that, apart from national insurance benefits, there is no liability attaching to the State unless the injured man proves what is practically impossible to prove, that is, that the injury was caused by negligence on the part of some servant of the Crown. In England the principle is that there is no State liability without proven fault, whereas in France the view is taken that the State must be held responsible for the risks that a workman runs by reason of his post in the public service.

Denning then says that the English tribunals are, in a sense, a set of administrative courts, although they have grown up in a haphazard fashion. He does not advocate abolition of this system in England; all he suggests is that the tribunals should be independent of the executive. The functions assigned to them are linked up with the enforcement of policy, and on that account they are suspect. How, then, is this much-needed independence to be achieved ? Denning's answer is: Give a right of appeal on a point of law to a superior court, not necessarily the High Court, which is itself known to be independent. Thus the law the tribunals will apply will be the law laid down by the superior court, and not by the executive.

Denning cannot shut his eyes to facts, and so he proceeds to point out that Parliament has of late consistently given a right of appeal to a superior court. Appeals lie, for instance, from the War Pensions Tribunals, Local Appeal Tribunals for Insurance Benefits, Disciplinary Committees of Marketing Boards and the Land Tribunals. The appellate authority, on Denning's showing, enjoys an independence and security equal to that of a judge. So the learned judge's conclusion is, by implication, that there is nothing to complain about the administrative tribunals functioning in England. Now that the law, according to him, is laid down by the superior court, and not by the Government, there is nothing to worry about.

It is difficult to see, however, how the law is laid down by the court unless the reference is to the common law principles, which have not yet been altered by statute, and which are left to be interpreted by the court. For it is well known that the bulk of the legal formulations as well as of the propositions of procedure owe their existence to policy to which the ministers are committed, and which is expressed in concrete terms in parliamentary statutes.

10. Independence and Security of Judges

I now came to the 'independence and security' of the judges of the superior courts. Here, too, Denning is our guide, our beacon-light in this perplexing world of conflict and convulsion, of tyranny and terror. The oasis in this desert is, of course, England, the invincible bulwark of freedom and democracy against the ruthless onslaught of communist totalitarianism! The executive, in Denning's considered opinion, must never be allowed more power than is absolutely necessary. They must always be made subject to the law. There must be judges in the land, who are no respecters of persons and who stand valiantly between the liberty of the citizen and the encroachments of the executive.

All these principles and maxims, we are solemnly told, Englishmen taught the Kings from Runnymede to the scaffold at Whitehall, and England has not experienced any

serious trouble since. In the Soviet Union and in the 'satellite countries', according to Denning, the judges take their orders from the party in power, and so there is no one "to stand between the subject and the executive". Well, where there is no 'subject' and where man is not a commodity like any other commodity for exchange, it is unnecessary to call frantically for a sentry in ancient robes and with mediaeval wigs, and to ensure, by elaborate and expensive legal provisions, his 'independence and security.' The Soviet judges are independent but subject to the law, yes, the socialist law (article 112). Denning says that ever since 1689, the English judges have been absolutely independent of the legislature and the executive. And how? 'An English judge, it may be said' in reply, enjoys a permanent tenure. He cannot be removed except for misconduct, and even then there must be a petition from both Houses of Parliament. For the last two hundred and fifty years no English judge has been removed from office. By a provision of the Act of Settlement he holds office during good behaviour, and not, as before, during the pleasure of the Crown. His salary, being charged on the Consolidated Fund, is not subject to the annual vote. It is not permitted, besides, to comment on his conduct in the course of normal parliamentary proceedings.

Admitting, as I do, that these provisions and conventions pertaining to the judges of the superior courts have given them a sense of security and independence so essential to the efficient administration of justice, what do they mean at least by implication? It means that but for these amenities the judges would not be what they have been and are, notwithstanding their learning, their training and their sense of values. A suggestion like this, I am sure, would not be relished by any judge of a superior court, far less by Alfred Denning himself, and yet this is precisely the conclusion that flows from this familiar line of argument. There is, of course, no denying the great achievements of the superior judges over a long period of history. But the social implications of a policy, which ensures independence and security of the judges but denies independence

and security to the broad masses, must not be overlooked in a paroxysm or romantic enthusiasm.

11. Security of Judges alongside Insecurity of People.

It is good that liberal provisions have been made, in the 'democracies', to keep the judges free from want and temptation. But why not give that freedom to all citizens, irrespective of birth, rank or social position and thus make this little world of ours a little more healthy and clean than it is today? If only a small proportion of the amenities guaranteed to the judges is placed within the secure possession of vast millions of starving men and women all the world over, especially in the 'democracies', many of the complicated social problems that confront the leaders of States will have disappeared from the face of this stricken earth. The question is, therefore, not really one of choice between administrative tribunals and regular courts of law, between the executive tyranny and the independence of the judiciary, between the concentration of powers and the separation of powers, between the supremacy of the law and the legalised totalitarianism. It is not even a question of choice between war and peace, between depression and boom. The question, instead, is one of social relations, of the conformity or otherwise of the relations of production to productive forces, of which class, in the last analysis, controls the machinery of the State, lays down policy, determines the rule of conduct and formulates law.

In States where there is continuous conflict of classes, where the property-owners, in control of the State machinery, exploit those who own no property and are denied access to the amenities of civilised life, but who constitute the bulk of the population, all organs of the State power are organs of the dictatorship of the owning class, the dictatorship of the minority. Over the centuries the symbol of this dictatorship has been what Robson aptly describes as the hegemony of the executive. The "dynamic resultants", of which Montesquieu wrote in propounding his famous doctrine of the separation of powers, were no more than fictions even in his time. They have been

rendered into mystic hallucinations since the development of monopoly capital from the beginning of the last quarter of the nineteenth century.

It is a commonplace of history that the executive is more adaptable to the requirements of emergency, more responsive to the class norms, more integrated with the interests of the dominant class or classes than a chattering parliament or a ponderous judiciary. As crisis deepens executive or administrative justice is bound to become of increasing importance as an adjudicating instrument in disputes concerning a vast catalogue of economic and social questions. At a certain stage of the crisis all 'democratic veils' are cast off, the dominance of the executive power becomes vital to the requirements of the governing class and power is concentrated, despite lyrics on the rule of law, the liberty of the 'subject', the mellowed sanctity of the judiciary and what not, in the hands of the bureaucratic watch-dogs of monopoly capital. Such a social phenomenon is symptomatic of what is known as fascism.

CHAPTER VI

ENDS OR FUNCTIONS OF THE STATE

1. Theory Versus Practice

I have tried to explain in the preceding chapters what the State is; how and why it comes into existence; where it differs from the Government; and what different forms and shapes States or Governments take. An attempt has further been made to examine the principles underlying fundamental rights, the rule of law, the sovereignty of Parliament and the doctrine of separation of powers; the circumstances leading to the growth and development of administrative law and executive justice; and similar other questions from both theoretical and practical points of view. It is proposed now to deal with what they call the functions of the State.

I should, at the outset, sound a word of caution. One must not think that the last word on the subject has been said by British and American thinkers and scholars. They have deduced theories or principles from a study of conditions which they know. Those conditions may differ basically from our conditions. We have in our country a vast mass of ancient literature, including the Vedas, the Purans and the Ramayana and the Mahabharat. The stories told and the principles enunciated in that literature have moulded the minds of our peoples these hundreds of years. Gandhiji often spoke of the Ram Rajya which, according to him, was India's cherished ideal. That ideal many Indians share, consciously or unconsciously. Different branches of our ancient literature throw light on the conditions of our country and her peoples three or four thousand years ago. They show, too, how the pattern of social relations and the forms and functions of the State come to be determined by a long process of social changes and upheavals.

In his interesting discourse given for the benefit of the Pandavas Bheesma, the Grand Old Man of the Kurus, related in detail the story of the origin of the State and its functions. Not that all Bheesma said is appropriate to the conditions prevalent at present. But these recitals and tales still make a tremendous appeal to our peoples. Bereft of its mystic or mythical exuberance our ancient literature constitutes a great mine of information and wisdom. It is not suggested that our society and State should be moulded in accordance with the Vedic text or with the pattern set by the Epics or the Puranas. An attempt in that direction would be futile and perhaps undesirable. No people can live in the past, however great and glorious that past might be. The past is important in so far as the present is its legacy, and the future is a phase in the continuous process of social evolution. No one can learn, to his benefit, in isolation from his people and from their tradition and memory. Ignoring this historical background a people cannot know themselves, acquaint themselves alike with their limitations and potentialities. They cannot control the forces of nature and remake society in a vacuum. There must be some reason why millions in our country are enthralled by the hymns of the Vedas, especially by the stories depicted in the Epics. One must carefully and sympathetically probe the cause or causes of these emotional reactions to an ancient but outmoded past.

For a long period in history man, as Mayo says, was limited to a one-sided understanding of history of society. That was because, on the one hand, the ideology of the exploiting classes distorted the phenomena of history and, on the other, small scale production restricted his outlook and vision. Thus man's social life is not confined to productive activity alone; there are many other forms of activity, such as class struggle, political life, scientific and artistic activity in which he is intensely interested, and in which he is a conscious or unconscious participant. His mode of thought is determined by all these activities. But in judging whether his knowledge or theory is right

or wrong man depends not so much on how subjectively he feels about it as on what objectively its result is in social practice.

All genuine knowledge or theory is rooted in experience. But man cannot experience everything directly or independently. Therefore, experience is of two kinds: direct experience and indirect experience. Take the knowledge of the ancient times, the times of the Vedas and the Epics and the Puranas. We have no direct experience of that knowledge. To our forefathers, however, it was, more or less, the result of direct experience—experience, that is, of the phenomena of various things, of the utility of cattle in predominantly pastoral life, of the beneficial or devastating effects of the forces of nature, of their separate aspects, and of their external relations to one another. But we have to test that knowledge by our own direct experience. We have to see whether the knowledge bequeathed by our forefathers scientifically reflects objective things as we know and understand them. If it does, then that knowledge is reliable, and we profit by it. If it does not, then it is unreliable and must be rejected as reflecting the ancients' subjective hallucinations. Therefore, knowledge in its totality is based on direct experience. For these reasons it is essential that we should study our past, examine it in the light of the present and try to shape the future on the basis of knowledge derived from our experience and from our understanding of the phenomena of the external world.

Again, one should not blindly search for books for knowledge, enlightenment and inspiration. Books of experience and observation are more useful and enduring than books in print, which normally come into your hands. Take a simple case. If you are resident in a rural area, you come across, do you not, a thana or a police station. It may be very near your house or at a distance of several miles. If you are resident at the headquarters of a sub-division or district, you find, do you not, apart from the thanas and thana officers and men, higher and superior seats of State

power. You find officers like sub-divisional magistrates, district magistrates or deputy commissioners, superintendents of police and officers and men subordinate to them. If you happen to live in a city like Calcutta or Bombay, you soon come to know, do you not, that there is a police commissioner, his deputies, his assistants and so on and so forth. What, do you think, they are doing? You ask yourselves, and you will get your answer. They maintain and preserve what they call law and order. They see that peace is not disturbed. If there is a case of theft or burglary, information is lodged with the police who then take action. If there is a fracas or scuffle, the police come along and adopt measures to ensure that the guilty ones are suitably punished. They see that such a thing does not occur again. This, then—the maintenance of peace and preservation of internal security—is the first primary function of the State. Here we make no difference between States and Governments.

At a little distance, occasionally you come face to face with soldiers, do you not, and hear of generals, brigadiers, colonels, majors, captains, lieutenants. These latter are officers. When we speak of soldiers we use the word in the popular, and not in the technical, sense. We mean the three well-known branches of the armed forces, namely, the army, the navy and the air force. By it we mean officers as well as the rank and file. What are these soldiers for? Well, they guard our frontiers. They are so trained and equipped that should any outside power or bandits invade or raid our country, they would be in a position to resist them, beat them off and drive them away. In this way the State maintains our country's territorial integrity. Not only that: what is no less important, without this armed power behind it, no State can talk with other States with dignity and authority. Further, when the police cannot cope successfully with a local disturbance or internal turmoil, the armed forces are called in aid of the police and civil power. The defence of the country against foreign invasion or raid is, then, the next primary function of the State. From the earliest time these two, that is,

(1) maintenance of internal security and (2) defence against foreign invasion, raid or aggression, have been the first and foremost functions of every State known to history, big or small, eastern or western. It is not enough to call these primary functions of the State. It is necessary to enquire why priority is given to these functions. Primarily, a State presupposes (i) internally the existence of a continuous class conflict; and (ii) externally, the existence of a threat or potential conflicts or contradictions between itself and other States. Consequently, its functions, in the initial stage, must be correlated to its origin and to the source and extent of its authority and power .

2. Distinction Between Society and State Thin in Ancient Times

In ancient times, however, the distinction between the State and Society was rather thin. Emerging, as it did, from society and in consequence of conflicts, the State strove incessantly to push its way up, and to relegate society to a subordinate role. Thus the State began to appropriate to itself functions, which earlier had belonged to society in a vague way. The State, represented either by a King, elected or hereditary, or by a Council of Elders, did not rest content with those two primary functions only. It told people how and when they should celebrate their religious rites. It told them among whom they should marry. It told them whether property left by a deceased person should vest in itself or pass on to his descendants. It told them what was right and what was wrong. It told them, finally, how wrongdoing would be punished in this life as well as in the life beyond. The State, in that remote past, stood for the entire temporal and spiritual power of society. Thus the King combined in himself the functions of the law-giver, the commander-in-chief of the armed forces, the supreme dispenser of justice and the gallant defender of the faith. The remnants of this all-pervading character of the State you find represented in the institution of English monarchy. You find a vivid picture of such a State depicted in Bheesma's interesting discourse to Yudhisthira and, in the

seventh century of the Christian era, in the revelations of the Quoran.

Gradually, however, the needs of society multiplied. The division of labour was deemed to be essential. Along with the division of labour came the separation of social functions. In the process of this change, temporal functions were demarcated from spiritual functions. The King shed his priestly robes. So we find Jesus Christ anticipating, about two thousand years ago, comparatively recent developments when he said: "Render to Caesar the things that are Caesar's, and to God the things that are God's". It means, to put it in a simple way, that the State and the Church are separate institutions. It means that one must not interfere with the other. The separation, however, was not complete, but the State, more and more, confined its major activities to the secular affair of its people.

3. The Effect of the Industrial Revolution

Then in Europe, particularly in England, what is called the Industrial Revolution came. Towards the end of the eighteenth century and throughout the nineteenth century captains of industry wanted more freedom than before to accumulate and invest. They worked from two ends. At one end, they laboured to hold, on an increasing scale, seats of supreme authority through representation in Parliament, Cabinet and other State organs. At the other end, they pleaded and fought for freedom of enterprise and private initiative. They wanted free trade. They wanted freedom to contract. They wanted guarantees as to personal possessions and private property. They wanted the State to restrict itself exclusively to police functions, that is, (1) the maintenance of internal order and security; and (2) defence against external aggression, raid or invasion. But they knew that even a police State had three main organs, namely, the executive, the legislature and the judiciary. They wanted, as in America, a complete separation of powers so that these three organs could function almost independently of each other. By the dubious device of checks and balances they wanted to

wrest the initiative into their own hands. Not that there was no controversy over the question of individual liberties as against social needs. But the main trend was one of non-interference except when the State was required to quell internal disturbance, to resist aggression, or to wage war. This trend continued in England and in other industrially advanced countries right up to the end of the nineteenth century.

It has been said that the nineteenth century was an individualistic age, but it is not explained why this kind of development took place. Individualism and socialism are not freaks of nature. They cannot be understood except in the context of the phenomena of the external world. The so-called individualism did not emerge out of nothing. It reflected a social development, a conflict between the forces of production and productive relations. If, it may be asked, the State were in the hands of the bourgeoisie, why should they have resisted the restraints sought to be imposed by the State? Well, during that period they had to share power inside the State machinery with the remnants of the feudal aristocracy, and naturally they preferred to be left to themselves in the organisation of their enterprise, in the manipulation of their resources and in their exploitation of labour. It was, besides, a growing and progressive phase of capitalism due largely to scientific inventions, increasing colonisation and enhanced accessibility to colonial raw materials. The legal machinery and the entire juridical superstructure could not keep pace with the tempo of industrial and capitalist expansion. Hence the growing bourgeoisie wanted a free hand, leaving to the State the function of protecting their interests at home and abroad by means of its police or armed power.

4. The Inadequacy of Old Pattern of Values

The present century, however, has revealed the complete inadequacy of the old pattern of life. Two Great Wars have occurred in the Course of two decades. These have produced vast and sweeping changes all the world over. In the Soviet Union you can hardly think of any secular

activities which it is not the function of the State to plan, guide and control or expand. Eastern European States are experimenting with planned State-craft. In the great Republic of New China the State is rapidly entering into domains, which had hitherto been the close private preserves of land-owners, industrialists and bureaucrats. Britain, the USA, our own country and other States and countries, north and south, east and west, have not been free from this impact of change. They are all going in for planned economy and social security. That means that the States are taking upon their shoulders functions which they dared not undertake two generations ago. The doctrine of the separation of powers is now being reduced to a nullity. The executive is rapidly becoming the State's supreme Directorate making the legislature and the judiciary minor partners in the business.

It does not mean that all the States are becoming socialist in the sense that the instruments and means of production are passing from the hands of private owners into the hands of toiling millions. It does not prove that they are all becoming welfare States in the sense that their resources are being utilised to promote the welfare of the exploited and downtrodden. It does not show that production for use is replacing the complicated apparatus of production for exchange with its booms and crises, with its 'bullish' and 'bearish' pulls. All that it means is that the forces released during these years have exposed and are exposing, more effectively than ever, the dangerous and disastrous consequences of the private ownership or monopoly control of the instruments and means of production. Some States seek solutions, in this crisis, by and through social revolutions, while others search for palliatives, 'deals' and make-shift expedients in a desperate effort to preserve the essence of the old, traditional pattern.

The State now is not merely a police power; it cannot simply afford to remain a police State. It is now, as it were, a producer's factory, a shop-keeper's godown, a trader's ware-house and a benevolent society, all rolled into one.

To (i) the traditional police functions of the State have been added (ii) economic functions; (iii) the so-called social welfare functions; and (iv) the secular functions, as it were, of the Salvation Army. Some call their States western democracies. To some their States are socialist States. Some States describe themselves as new democracies. Some, again, tell us that they are welfare States. All the States, however, are not of the same pattern. The patterns vary as they are bound to. Each of these patterns is determined by the character, traditions and sympathies of those who for the moment wield the supreme power of society. But there is one trend which is common to all. That trend is the expanding invasion by the States of spheres of social activity.

5. State Intervention Does Not Mean Socialism

This trend is described by text-book writers as a change from the nineteenth century individualism to the twentieth century socialism. It is undoubtedly a change, a far-reaching change. But the description, I contend, is neither adequate nor fully appropriate. Socialism does not mean merely intervention of the State in the different spheres of social activity. It implies a thorough overhaul of productive relations and a corresponding reorganisation of the State machinery to give expression to these new productive relations. Therefore, it is wrong to think that predominantly bourgeois States have become socialist by reason of their intervention in certain social problems.

This increasing State invasion of the spheres of social activity is symptomatic of a deepening crisis. In the bourgeois States the crisis has been precipitated by (i) the internal conflict between capital and labour; (ii) competition, in the international market, between capital and capital; and (iii) the challenge of the colonial countries to foreign exploitation. In the colonial and semi-colonial countries the conflict is none the less acute between the productive forces and the relations of production. The tensions caused by the crisis are sought to be eased in these countries, no less than in the bourgeois States, by their

respective dominant classes by a kind of socialist make-believe and opportunist idealism. Added to this is a spate of race hatred and incitement to war psychosis. All the same this trend underlines the urgency of an economy of abundance on the basis of planning which cannot be effectively pursued except in the context of a drastic change in the relations of production.

I shall cite one recent example from our own country. I am speaking of the famine of 1943-44. The country was then under British rule, under British colonial domination operated through the British Government's agents. British and Indian. Enormous troops under Allied control had been stationed in various parts of the country. The Fourteenth Army under a British commander was operating along a huge defence line covering, on the north, the Imphal sector and, on the south, the Arakan sector. Indiscriminate use was made of the printing machine to issue paper money to meet, on account, the expenditure incurred by this Army. Goods and commodities manufactured and produced in the country were requisitioned for supply to the armed forces. The entire economy of the country, particularly of Bengal, was shattered, and then one of the worst famines in history broke out. Thousands perished in the streets of Calcutta, and tens of thousands were completely uprooted and cruelly thrown out of their moorings. The Government were forced to react by intervention in hitherto untrodden field. For the first time in that year they had to open ration shops. From these shops they sold rice at a fixed price in a big city like Calcutta and industrial areas. The quantity allotted to each individual was also fixed. Where did the Government get rice from? They got it either by import from outside (which, of course, was negligible), or by procurement in the rice-producing areas within the country. Thus you see that the Government became at once purchasers, sellers and distributors. A generation ago people could not even conceive that the Government would undertake this job. Today, however, it is as real as the fact of your reading this book. But this

intervention on their part does not prove that the Government turned socialist overnight. Nothing of the kind happened. On the contrary, the British colonial rule remained as before, land and other instruments of production continued in the hands of private owners, and the capitalist economy of scarcity was not in the least disturbed. The Government's intervention was only a make-shift expedient to stare off the crisis which threatened the then existing economic or social category.

Now, under our new Constitution the State has undertaken certain obligations to its citizens. For instance, it offers equality of opportunity in matters of public employment. It prohibits discrimination in treatment on grounds of race, caste, sex or place of birth. It bans traffic in human beings and forced labour. It prevents employment of children in factories. From one angle, these and others of like character may be called our rights, our fundamental rights (Part III). From another angle, these are obligations of the State, its necessary modern functions. Then a contrivance familiar to all modern 'democracies' is devised. These functions are sought to be reconciled with the function of protecting private ownership of the instruments and means of production. Our Constitution says that you have the right to own and possess private property. It says, too, that your property cannot be acquired or taken possession of without compensation. It is an obligation cast upon the State by the Constitution to ensure that there is no interference with the rights guaranteed therein. Thus in the 'democracies' individual freedom and social security are presumed to be compatible with private property and monopoly control, whereas the basis of individual freedom and social security under socialism is the abolition of the private ownership of the instruments and means of production.

Apart from all this, our Constitution lays down certain principles of State policy (Part IV). They are directive principles. They are not enforceable in courts of law. But our Constitution tells the State that in administering the affairs of the country, it should keep in view those directive

principles. The State is asked, for example, to devise measures for the promotion of public welfare. It is asked to provide for education and give employment to its citizens. It is asked to ensure a living wage for workers. It is asked to raise the standard of living, and to improve public health. It is asked to adopt schemes for the improvement of agriculture and animal husbandry. It is asked to strive for the promotion of international peace and security. These are functions the State may not undertake immediately. But their recitals in the Constitution constitute an admission that the State is no longer merely a police force, that the existing social relations are hampering full utilisation of the productive forces, and that the State must discharge certain social functions. Despite all these admissions, that desperate but determined effort continues, namely, that of reconciling the irreconcilables. You cannot plan for self-sufficiency, far less for plenty, on the basis of the economy of scarcity, which is of the essence of private ownership and control of the instruments and means of production.

Those social functions were exercised in earlier times, if at all, by society as a whole, voluntary organisations or private individuals. No longer can they be left in that condition. For people believe that unless there is planning for every kind of social activity by the politically organised community as a whole, there is bound to be chaos, confusion and conflict, and that its power must vest not in the privileged few but in the toiling masses. A widespread belief has been generated by the moral and material inadequacy of the class character of bourgeois States and their satellites that that class character must undergo a complete transformation. Thus, in our time, the State can no longer afford to be a mere police barracks or the general head-quarters of the army. The crisis has imposed and is imposing, on an increasing scale, on the State functions which, in the phase of progressive capitalism, had been left to private initiative and enterprise. The State, as they say now, must not only govern but administer. It must not only administer but minister as well.

6. How Functions Differ From State to State

It is the usual practice with writers, thinkers and scholars to investigate and examine the functions of the State with reference to its form. It is suggested that the functions of a feudal State are not similar to those of a capitalist State, that the functions of a capitalist State are different from those of a socialist State, and so on. No exception may be taken to this classification of functions of the State against the background of its form. But where the form does not correspond, to its substance or its social content, the classification may lead to conclusions which are contrary to fact. I shall try to illustrate my proposition. You have heard of western democracy. Britain is known to be a western democracy. Though of a slightly different type, America, too, is called a western democracy. You may have heard of Eastern European democracies and of the People's Republic of New China, a 'democratic dictatorship'. One may be wondering what after all is 'democratic dictatorship'. Democracy and dictatorship being antithetical, is not 'democratic dictatorship' a contradiction in terms? No, it is not. Democracy is not repugnant to dictatorship.

As Mao explains, two aspects, democracy for the people and dictatorship for the reactionaries, when combined, constitute the people's democratic dictatorship. In the ranks of the people the democratic system functions by freedom of speech, of assembly and of association. In the ranks there is criticism of each other and there is, also, self-criticism. But the reactionaries are denied all democratic rights. The army, the police, and the courts constitute the machinery of the People's Republic of new China as they constitute the machinery of every other State. These are the instruments with which the dominant class or classes keep down other classes. To all the hostile classes they are instruments of oppression. This is a phenomenon, which is not peculiar to any particular State. It is the common feature of all States. The real point of difference between a State and a State rests on who, for the time being, constitute the dominant

class, and operate the coercive apparatus in the name of law and order.

At the present stage of development in China the dominant classes are the 'people'. Who are the 'people'? They are the working class, the peasantry, the petty bourgeoisie, and the national bourgeoisie. For them it is a democracy; it is their State. The others are reactionaries, and for them it is a dictatorship. Thus what is a democracy for the 'people' is a dictatorship for the reactionaries, what is a Government for the 'people' is organised coercion for the reactionaries. Hence the Chinese State, under the leadership of the Communist, is called democratic dictatorship. It differs, in content as well as in form, from the 'western democracies' and, in a measure, also from the Soviet State. It is committed, however, to transforming its present phase into a socialist and, eventually, a communist society, when all classes will disappear and universal harmony become a reality.

Our country, according to the present Constitution, is also a democracy. Part of it, it may be noted, is based on the system of Government which it has replaced. Part of it is reproduction of customs and conventions which have been evolved in Britain. Part of it has been derived from enunciations of the American Constitution, the Constitution of Ireland and the Weimar Constitution of Germany framed after the First World War. Our Constitution is republican in form. Our country is called a sovereign democratic republic.

What then, you may now ask, is democracy? Democracy, to quote Abraham Lincoln, famous American statesman, is Government of the people, by the people, and for the people. A Government of the people means, perhaps, a Government which is fully alive to their traditions, their customs, their beliefs. It must accord with their genius. In other words, a Government of the people must be completely identified with them. A Government by the peoples perhaps, means that the people choose their rulers, keep them in seats of authority and have power, if they so like, to overthrow them. In other words, the people

themselves shape their own destiny for good or for evil. A Government for the people, perhaps, means a Government which is committed to the promotion of public good, and to the furtherance of popular interest. In other words, the Government must not only give the people the protection of their homes but see that no injustice is done. It must see that no grievance remains unredressed. It must see that no one suffers in body or mind for lack of suitable opportunities, or without due cause, it must see, also, that there is no impediment in the exercise of the freedom of movement, freedom of thought and expression, and freedom of association and assembly.

7. Controversy as to Form and Content of Democracy

These and certain other rights, already referred to, have been recognised in our Constitution as Fundamental Rights. Our Supreme Court and State High Courts are empowered to issue appropriate writs for the enforcement of these rights (articles 32 & 226). These are justiciable rights and take precedence, in cases of conflict, over other laws (article 13). Our country is called a democracy, first, because the Constitution has given us Fundamental Rights, which are justiciable, and second, because all adult citizens, male or female, enjoy the right to vote. They have the right, that is, to elect and to be elected members of Parliament, and of the legislatures of States. These members are law-makers. To them our ministers are responsible. Therefore, the idea is that by their choice, direct or indirect, our people have chosen their rulers, including the President and Ministers. Not only do they choose them, but they have power to unseat them at suitable opportunity, that is, at an interval of five years or earlier when general elections are held.

There is, however, controversy over the form and content of democracy. There are, for example, thinkers and statesmen who believe that a mere statement of rights of citizens in the constitution does not make a country a democracy. Conditions must be created by the State for the full and free exercise of those rights. Means must be

found by the State by which those rights can be exercised. Opportunities must be afforded by the State to every citizen so that he may be in a position to enjoy those rights without anybody's interference. In the absence of such conditions, means and opportunities, a mere declaration of rights, according to them, is a formal democracy but not a real democracy.

I give you just one or two examples. The American Constitution guarantees the freedom of speech and of the press (First Amendment). It is true that subject to certain limitations, every American citizen can speak or write whatever he likes. Suppose an American citizen has no printing press of his own or under his control. How will he express his opinion through the press? The owners of the press may refuse to give publicity to his opinion should that opinion be considered by them hostile to their interests. Even if the newspaper owners may have no objection, advertisers may ask the owners not to lend their press to publication of an opinion which is unpalatable to them. In modern times advertisements constitute the main source of revenue to newspapers, and one of the greatest advertisers is the Government. Thus between the Government and the non-official advertisers they exercise a great influence over the press. They may control its policy. Expressions of opinion, which seek to promote and further popular interests, may be completely banned despite the constitutional guarantee as to freedom of opinion or of the press.

Newspaper owners may say that it is their right equally guaranteed under the constitution to use their discretion as to whether they should or should not publish this or that matter. Thus one guaranteed right may cancel another guaranteed right, freedom of private ownership being set against freedom of the press. In practice, generally, the first freedom may supersede the second freedom. Freedom of the press may mean, in effect, freedom of the pressowners or of the big advertisers. In a formal democracy, it is argued, such things frequently happen. Therefore, they argue that in addition to declarations of rights, there

must be, in a real democracy, adequate means through which those declarations may be translated into practice.

Take another case. By a Proclamation issued in 1858 after the Sepoy Rebellion, Queen Victoria took upon herself the Government of India. The Queen and her Government in the United Kingdom were solemnly pledged, by and through that Proclamation, to admit to her service freely and impartially all her subjects, of whatever race or creed, regard being had to their education, ability, and integrity. In short, equality of treatment in the matter of public employments was guaranteed to all the Queen's subjects irrespective of race, colour, or religion. Was this solemn pledge honoured and implemented honestly and faithfully during the entire period of British rule ? No, it was not. A wall was erected between the Queen's British subjects and Indian subjects on grounds of race and colour. Nor did this pledge make India a free and democratic country. Of course, appointments to public offices are a minor point as compared to the big and complicated issues which confront modern States or Governments. But it is a pointer. It proves, first, that rights guaranteed in an authoritative document have hardly anything to do with the question whether a given country is free or democratic. It proves, second, that such rights may be honoured more in their breach than in their observance, unless the material means for enforcing them are available to the people. To treat them as justiciable rights is no adequate protection by reason of the very restricted nature of the court's powers of intervention, and of the tedious and expensive processes involved therein.

8. Formal and Substantial Rights.

Democracy, in the proper sense of the term, is supersession of the pretensions of a privileged few by the claims of the common people. Different peoples and different individuals, however, mean different things by democracy, and democracies differ too. But in real democracy toil gets priority over title. Rights vary from State to State or even from democracy to democracy, and so do their respective

society. Imagine, for a moment, your home to be a little State. You are preparing for the M. A. Examination. Your younger brother is in B. Sc. class. One room has been set apart for you, two brothers. You are reading a book just to learn how our country has been partitioned and why. Your younger brother is trying to work out a complicated mathematical theorem. You begin to shout at the top of your voice. Your younger brother complains that he cannot prepare his lessons because of your shouting. Either you stop shouting and read quietly, or your father or mother comes along and administers a rebuke. So you see that you have a duty just as you have a right. It is your right to study your subject as diligently as you can. In exercising that right you have also a duty, which you owe to your younger brother. Your duty is not to interfere with his studies.

Now, widen your horizon. From home you go out into a wider world, your State and your country. If the State recognises your right to freedom of expression, as it does, you have the duty not to defame or slander your neighbour. If the State gives you the right to form associations or unions, as it does, you have the duty to see that your associations or unions do not engage in activities which undermine public morals or encourage moral turpitude. If the State guarantees to you the right to carry on any occupation, trade or business, as it does, you have the duty to refrain from such occupation, trade or business as may be detrimental to public good, or prejudicial to your neighbour's interests. If the State grants you a gun licence, occasionally as it may, you have the duty to keep it in order, and not to use it against your fellowmen except in extreme cases of self-defence. These are all right in a general way. But when the power of the State is exposed to open and organised challenge, all your rights may be suspended or completely taken away. All your rights are subordinated to the interests and requirements of the dominant class that is in possession of the State power.

In modern times, however, in almost all countries which

have written constitutions, there are generally declarations of rights for citizens. But few of them provide the conditions for the exercise of those rights, and for the means by which they can be exercised. Provisions may be made for equality in the eye of law, but in fact, there can be no equality between those who are forced to sell their wagelabour and those who own the instruments and means of production, between the employers and the employees, between the landlords and the peasants. In such circumstances rights, however solemnly declared in the constitution, are no better than formal rights. Where equality, in fact, is not ensured, the State hesitates to impose obligations or duties on citizens except the imperative obligation to submit to its class character, for such an imposition is bound to involve reciprocal obligations or duties on the part of the State. Take one typical case. In the Soviet Union work is a duty and a matter of honour for every able-bodied citizen, in accordance with the principle: "He who does not work, neither shall he eat". This legal imposition can have no meaning unless there is a guarantee as to the right of employment for every able-bodied citizen. That guarantee becomes its function. Hence in exercise of its function the Soviet State guarantees to him the right to employment, and payment for his work in accordance with its quantity and quality, which is of the essence of the socialist order. It is not democracy in the abstract.

There are other examples to which I referred when I dealt with such other aspects of democracy as are sought to be expressed in the parliamentary system of government through the organisation of political parties, the rule of Law and the separation of powers. But democratism in the abstract, a democratic form without democratic content, sooner or later, accentuates the conflict between the claims of the oppressed millions and the pretensions of an organised exploiting minority which is the State. This conflict, in its turn, gives rise to upheavals, uprisings and revolutions notwithstanding its ever-increasing social and economic functions.

10. The State's Triple End

It is clear from the preceding discussions that one can have no correct conception of the functions of the State unless these are studied against the background of the rights of individuals and the obligations cast upon them, of the source and authority of the State, of the particular type of class conflict of which it is an expression. Professor Garner is a familiar name among students and scholars in our universities. In dealing with what he calls the ends of the State in his book, *Political Science and Government*, he leaves no conceivable European or American author, ancient, medieval or modern, unmentioned and unhonoured. From the State as the end of the State to the State as an instrument for promoting the 'good of mankind'; from the State as striving for the realisation of the best life by the individual to the State as a power designed to give justice and law; from the primary ends of the State to the secondary and ultimate ends of the State; from the actual ends of the State to the ideal ends of the State; from the 'morality' theory of Hegel to the 'general welfare' theory of Holtzendorff and Bluntzchli—there is, it seems, no single proposition relating to the ends or, more precisely, the functions of the State, which he has not laid under contribution. After traversing this extensive tract of territory the learned professor concludes that the State has a triple end. Firstly, its mission is the advancement of the good of the individual. Secondly, it promotes the collective interests of individuals in their associated capacity. Thirdly and finally, it aims at furthering the civilisation and progress of the world. Put in a different way these are what Burgess has described as the primary, secondary and ultimate ends or purposes of the State: individual view, national view and world view—all integrated in a total view of the State and its ends or purposes!

It is, of course, common ground that every State in modern times is called upon, under the compulsion of events, to undertake functions which vitally concern individuals as primary units of society, the people as a whole and the world outside. It is further admitted that, apart

from its growing participation in the management and control of different sectors of the social economy, it has to apply its energy and resources to inter-State and international problems upon a scale which is never constant and which is increasing by leaps and bounds. Even in handling national problems it has to take into consideration the repercussions of its policy and programme outside its territorial borders, and its extra-territorial commitments and obligations.

More than five dozen States, big or small, have joined the United Nations, an international world organisation, whose charter commits the member-States to the maintenance of "international peace and security"; to the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"; and to the achievement of "international cooperation in solving international problems" alongside the promotion and enlargement of "respect for human rights and fundamental freedoms for all". Further, the member-States have agreed to promote "higher standards of living, full employment, conditions of economic and social progress and development". They are committed to seeking "solutions of international economic, social, health, and related problems". They are pledged to promoting "international cultural and educational cooperation", and "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

None of these obligations or functions, however, detracts from the "sovereign equality" of the member-States. At the same time they are to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations". They bind themselves to give the United Nations "every assistance in any action it takes" in accordance with the charter, and to "refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action". To carry out the

purposes as set out in the charter various organisations have been set up. It must, however, be clearly understood that the United Nations is not a world State or even a federation of States or an association based on confederal relations. It is recognised that world opinion will not accept the surrender of sovereignty which the establishment of a world State must necessarily involve. The Security Council, which is the UN's enforcement agency, depends upon the sovereign member-States for the weapons alike of persuasion and of force in the discharge of functions assigned to it. Similarly, the functions of the UN's General Assembly are restricted to discussion and deliberation without the power to legislate. This restriction rests on the principle that the power to legislate would encroach upon the sovereignty of the member-States. All these facts, circumstances and developments must be taken due note of in reaching conclusions as to the functions of the State in our time.

11. The State's Ends or Functions Determined By Its Class Character.

But if the ends or purposes of the State are such as are described by Garner, why are there so many States in the world ? Why do these States, time and again, come into conflict with each other, and imperil the peace and security of countless millions of human beings ? Why do conflicts occur between the ruling power and the ruled within the municipal sphere ? These questions Garner does not care to answer, although one cannot avoid or shirk them while dealing with the ends or functions of the State. Conceding, however, that Garner and those authorities, whom he has cited, have only written of what the State should do or strive for, and not of what the State is, in fact, doing or striving for, how does it contribute to a correct understanding of the intricate problems they have posed ? What a thing should be, as distinguished from what, in fact, it is, is what, one feels about it, and not what, in the external world, it is. Implicit in their formulations is dogmatic adherence to the Kantian 'pure reason' or, at any rate, to the 'rationalist'

school, which admits only the reality of reason bereft of experience, and not based on the facts and phenomena of the external world. That is turning things upside down.

Reason is reliable only when it is derived from perceptual knowledge, from observation and experience. One is more directly and immediately concerned with what, by the law of motion of its class character, the State actually does, and not with what, in the imagination of metaphysicians, the State should do. The ends or purposes of antagonistic classes are not, and cannot be similar. Consequently, the ends or purposes of the State are determined by the dominant class which, in reality, constitutes it, and its functions are accordingly defined and pursued. The rights and obligations of its citizens are made compatible with those ends or purposes, and the ends or purposes aforesaid are, in the main, projected into its international commitments.

CHAPTER VII

THE HISTORICAL BACKGROUND OF THE INDIAN POLITICAL SYSTEM

1. A Colonial Legacy

The constitutional system of a country, like its law, reflects the hopes and aspirations, fears and anxieties of its makers and builders. They may be drawn from a single class or from different classes. But it is the dominant class that has the last say, although, as a means of moderating the conflict, where the class contradictions cannot be otherwise dealt with, concessions are made by the dominant class to other classes. Where the classes are poised in equal strength there is a stalemate, or a compromise, or a conflict. In the event of a stalemate or conflict the one or the other class, by its superior skill or for other reasons, forges ahead, takes power into its own hands and exercises that power in the name of all but, in fact, for the purpose of furthering its own aims and promoting its own interests.

The Indian constitutional system is no exception to this general rule. It is not a record of achievement in the sense in which Stalin interpreted the USSR Constitution of 1936. It is partly a record of what has been achieved and partly a program of what is to come in near or distant future, but mainly the encumbered legacy of a crumbling colonial Empire. All these facts and trends must be borne in mind when one proceeds to examine the profit-and-loss account of the political enterprise started in 1947 with so much fanfare. The first point that comes to one's mind in this connection is, of course, the partition of the country, and questions continue to be asked about it even today because the questions repeatedly asked during the last several years have not been adequately and properly answered. What, it is asked, is the basis of this partition? To what factors or circumstances is it to be attributed? Was there no alternative to partition? What effect has it already

produced or is likely to produce in future ? Is it desirable or necessary to get it annulled? If it is, how ? Is the annulment of partition within the range of practical politics ?

History is not always studied critically or scientifically. Sometimes what passes for history is only a record of dates and battles, of palace-intrigues and of whims and caprices of Kings and Queens. Now and then we talk of the unity of the country without trying to understand what we mean by unity. We talk of the Indian nation without reference to those social and economic forces that lead to the growth and development of a nation. We talk of the Indian culture, ignoring that culture is not merely an idea, not a fantasy. Some patriotic Indian historians have discovered a unifying national force in the great experiment of Asoka, a common pattern of values in the Ramayana and the Mahabharata, and some sort of parliamentary democracy in the *gram panchayets* and councils of courtiers.

They forget that the concepts such as 'nation', 'parliamentary democracy', 'cultural unity' are not immutable categories. They represent a certain phase or phases of social evolution and emerge from certain material conditions and a particular type of productive relations. Where such conditions or relations are absent those social categories simply cannot come into existence. On the other hand, men like Lord Morley, a former Secretary of State for India, and Professor A. B. Keith, whose versatility in the realm of scholarship earned world-wide reputation, thought that the fundamental principles of democracy were inconsistent with the structure of Indian society, because it was "founded on the basis of social inequality and racial and religious diversity".

Evidently these distinguished British savants deduced, in common with their fellow travellers, those "fundamental principles of democracy" from their knowledge of the working of the British parliamentary institutions which, like all bourgeois institutions, assumed 'social equality' for socially equal classes or individuals. Not that we in India had, during the relevant period, 'social equality', but

it cannot be denied either that the 'social equality', as understood by Morley and Keith, denied freedom from fear and insecurity to the under-dogs, and equal opportunities for development to the ruler and the ruled. I am citing these instances to show how history is misinterpreted, if not distorted, even in apparently capable hands.

2. Ever-Changing Scenes

So far as India is concerned, it is not, and has never been, a constant, individual historical phenomenon. Over centuries it has undergone variations in size and importance from the political point of view. The racial and religious composition of the population has recorded changes from time to time. There have been movements of large masses from one part to another, leaving in its train a sharp realignment of social forces. Throughout, however, the contradictions between the forces of production and productive relations have produced a succession of events with far-reaching consequences.

Now, take the political map of India. One need not look back into the dim, distant past. Confining ourselves to the British period, what do we find? For a long period the Moughals had no legal sovereignty over extensive Indian territories which *de facto* were shared between the Mahratta supremacy in the centre and the south and the Sikh kingdom in the north and the west. Assuming, however, that the Moughal sovereignty *de jure* was complete and all-embracing, the East India Company's rule was counterfiet, at least until the death, in 1850, of Fakr-ud-din, heir apparent to the Moughal title.

But long before that date by cession, conquest or grant of tenure the Company had acquired possession and control of large and extensive tracts. By the marriage treaty of 1661, the island of Bombay had been ceded to the English King by Portugal who had held it in full sovereignty. The King transferred it to the Company in 1668 by a charter. The island was claimed to be British territory. Madras the Company held as a tenure on its restoration to the Crown by treaty with France in 1748, but the legal sovereignty

of the Moughal Emperor was not challenged. In 1650-51 the Company had established a settlement at Hooghly and extended it to Kasimbazar and Patna. In 1698 they obtained the zemindary right for consideration over Sutanati, Calcutta and Govindpur. The factory at Calcutta was fortified and in 1700 it became the seat of a presidency. The defeat of Seraj-ud-daula in 1757, it must be noted, did not end the legal sovereignty of the Moughals. The Twentyfour Parganas which had been acquired in 1717 were assigned to Clive as a zemindary estate by Mir Jafar in 1759. The districts of Burdwan, Midnapur and Chittagong came into the hands of the Company in 1760 when by its fiat Mir Kasim replaced his father-in-law, Mir Jafar.

Keith thought that the sovereignty over these territories was definitely British, discarding, without sufficient reason, what he called the vague claims of the Moughal Emperor to be the paramount sovereign in India. It is not, however, my intention in this book to examine the legal aspects of the Moughal sovereignty set against the ethical norms established by force by the Company and its adventurous factors. What I want to stress is that India had never perhaps been a political entity in municipal or in international law in the sense in which we have learnt to understand it during the last hundred years or more.

Some have found in the British attempt at centralisation the invisible hand of destiny. Others have attributed it to the British genius for constructive revolution. But the fact is that the need for markets and capitalist expansion, by its own law of motion, eliminated the remnants of a corrupt, crumbling feudal order, and led to political unification and legal and administrative uniformity on the basis of new social relations. It was not so much a conflict of races and nationalities as a conflict of social forces. It was not so much a struggle between Indians and Europeans as a struggle between a rotten, discredited feudal set-up and an enterprising, ruthless and unscrupulous capitalist machine, trying energetically to open out.

3. Territorial Divisions as Political Contrivances

In the pre-British era India had not been a political whole, and the territories had not been clearly demarcated in accordance with any systematic pattern of political or administrative distribution we came to know later. Nor, under British rule, whether of the Company or of the Crown, was the pattern constant. It underwent a good deal of transformation. For instance, Bengal, Bihar, Orissa and Assam were, for a long period, component parts of one administrative unit under a lieutenant-governor. In 1874, Assam was constituted into a chief commissioner's province. In 1905, Bengal was partitioned. The western part of it together with Bihar and Orissa formed a lieutenant-governor's province, and another province of the same status was created out of its eastern part together with Assam.

The partition of Bengal provoked a storm of protest which culminated in the first organised uprising against the Crown's rule in this country. It took different forms : from the peaceful boycott of British goods to the organised revolutionary activities calculated to overthrow the British from the seats of power. Two Bengals were reunited and constituted into a governor's province in 1912. Assam was made to revert to the status of a chief commissioner's province, while Bihar, Orissa and Chota Nagpur were placed under a lieutenant-governor. The capital of India was removed from Calcutta to Delhi, which was separated from the Punjab and brought under the direct control of the Governor-General, exercised through a chief commissioner.

In addition to the presidencies of Bengal, Madras and Bombay, which had already been governor's provinces, the Government of India Act, 1919, raised the United Provinces, the Punjab, Bihar & Orissa, the Central Provinces and Assam to the same status, in the sense that they were all governor's provinces. The governors of the presidencies were appointed by the King by warrant under the Royal Sign Manual, whereas the governors of the other provinces were so appointed after consultation with the Governor-General. The province of Burma, which was then a unit of India, was governed by a lieutenant-governor.

Incidentally it may be noted that Lower Burma had been placed under a chief commissioner in 1862. Sixteen years later Upper Burma was added to it, and in 1897, the two Burmas, already united under British authority, were constituted into a lieutenant-governor's province. That officer was appointed by the Governor-General with the approval of the King from amongst senior men of the Crown's Civil Service in India.

Territorial redistribution was again effected under the Government of India Act, 1935, but this time it was of a far-reaching character, being a prelude to the events of 1947. Burma ceased to be part of India. Sind was separated from Bombay and placed under a governor. Bihar & Orissa was cut into two governor's provinces, and the province of Orissa was given certain areas from Madras. The north-west frontier belt was constituted into a governor's province.

The description given of these periodic territorial and administrative changes is by no means a full and complete picture. But one or two points are clear. First, as has been indicated above, India, politically, was not a constant quantity even under British rule. It changed from time to time. The areas were brought within its jurisdiction, which had previously belonged to the Moughals, or to the Marhatta confederacy or to the Sikh kingdom, or to an independent ruler or rulers across the Bay of Bengal. The territory added to the Crown's Indian Empire was again cut out from the political entity known as British India. Extensive tracts were left to the care of the Princes, subject to the Crown's paramountcy. Second, the territories of certain provinces were, from time to time, redistributed, and new provinces were created out of the old ones with territorial readjustments considered necessary by the British Government and their agents out here to ensure their authority and to consolidate their domination.

One should, I suggest, bear all these points in mind in interpreting what followed in 1947. It is, of course, true that these changes or variations did not, to any extent, derogate from British sovereignty. It was the British

State carrying out certain surgical operations, as it were, in a desperate attempt to adjust its strategy to a fast developing crisis due to irreconcilable capitalist contradictions at home and abroad.

4. Religious Divisions as a New Imperialist Device

Along with these territorial and administrative expedients the British Government soon addressed themselves to the communal variant of their over-all Indian strategy. It is popularly known as the policy of divide-and- rule. Reference is frequently made to the Aga Khan Deputation that waited on Lord Minto in October, 1906. Maulana Mahomed Ali described it as a "command performance" in his address, as President of the Congress, to the Cocanada Session in 1923. The Maulana, himself a distinguished Muslim, made no secret of his view that the inspiration had come from the British, and that the Aga Khan and his colleagues had allowed themselves to be used by them as pliable instruments in their hands. The proposals canvassed by the Deputation formed the basis of separate electorates, introduced for the first time under the Government of India Act, 1909, for Muslim representation in legislative bodies. Thus Minto's Muslim 'counterpoise' to 'Hindu sedition' was in action in the realm of constitutional politics.

Morley somehow persuaded himself that "the difference between Mahomedanism and Hinduism is not a mere difference of articles of religious faith", and that "it is a difference in life, in tradition, in history, in all the social things, as well as articles of belief that constitute a community". Morley's proposition was carried to its logical conclusion in a series of subsequent measures, including the Macdonald Award which was the basis of representation in the legislatures created under the Government of India Act, 1935. In consequence of this statutory recognition of separate representation on the basis of religion and of territorial redistribution, more as a political device than for administrative efficiency, several Muslim-majority provinces came into being, such as Bengal,

Sind, the Punjab and the North-West Frontier Province. Baluchistan, a predominantly Muslim area, was administered by the Governor-General acting through a chief-commissioner appointed by him in his discretion. The ground had been prepared, the stage set, and only the finishing touches remained to be given to the exciting drama that we witnessed in 1947.

As a matter of fact, the foundations of political dismemberment and religious conflict at Governmental levels had been laid by Curzon in 1905. Designed apparently to bring Bengal within manageable size and to ensure administrative efficiency, the scheme of partition, inaugurated by Curzon, had a two-fold purpose. The purpose, in the first place, was to create conditions of continuous antagonism between Hindus and Muslims and, in the second place, to undermine the growing composite nationality of Bengal, who had taken the initiative in giving an impressive show of resistance to British colonial rule in this country.

5. India's Failure to Counter British Measures

That the custodians of British colonial interests, Conservative, Liberal and Labour, would resort to such means is quite understandable. What is amazing is that nothing practically was done on the Indian side to expose their motives and intentions, and to wean the Hindu and Muslim masses away from a dangerous, disruptive and mischievous course. Except on the question of Curzon's partition of Bengal, to which, of course, the people reacted firmly and with determination, the Indian leaders failed to offer any alternative to the British proposals for territorial redistribution and parliamentary representation on a communal basis. The fact, on the contrary, is that they either approved of, or acquiesced in, every step sponsored by the British Government. Recall, for instance, Gokhale's approval in 1915 of the principle of separate Muslim representation; the Congress-League Agreement of 1916 ; and the Congress's 'neither accept nor reject' resolution on the Macdonald Award under Gandhiji's leadership.

I am not suggesting, unlike some Hindu leaders, that the British rulers succeeded in forcing their policy because the Congress was all the time trying to 'appease' the Muslims. What I contend is that the British imperialists knew where our weakness lay, and that they exploited that weakness to the fullest extent.

During the entire period of its movement the Congress had no social programme worth the name. Gandhiji frequently stressed that in essence all religions were alike, and that Allah and Hari were only two names for the one Supreme Law-giver. Pandit Nehru vaguely spoke of mass contact and at Karachi the Congress presented a text-book essay on fundamental rights. Then at Faizpur the Congress leaders put forward the demand for a Constituent Assembly to enable the people to give unto themselves a constitution of their own making. Instead of providing a rallying force these things served as irritants and caused suspicion among Muslims.

6. Congress Leadership's Role in Class Conflict

A factory worker does not very much care whether Allah and Hari are the one and the same Supreme Being; he wants to know whether, in the kingdom of Allah or of Hari, there is a perpetual tenure for the exploitation of the many by the few. A rack-rented peasant is not interested in 'mass contact' ; he wants to see the end of 'mass slaughter' by starvation. Our common folk have no taste or leisure for pale Indian versions of the lucubrations of the eighteenth or nineteenth century bourgeois ideologists about Constituent Assembly and Fundamental Rights. Instead, they want to know if national independence means work for them, and food and shelter for their children and dependants. And worker, peasant and common folk, all want that their language, their script, their culture, and many other things they hold dear, are not unduly interfered with or destroyed in the name of national unity, or on, the plea of uniformity of values.

On such and like issues there was no controversy between Hindus and Muslims as such, and it is significant

that the leaders of the Congress and the Muslim League dared not tackle non-controversial issues. Involved in these issues was, however, another kind of antagonism, that is, conflict between 'haves' and 'have nots', between the expropriated many and the privileged few. The Congress and League leaders were not above that conflict; and guardians and beneficiaries of privilege and vested interest, as history shows, have never been believers in material self-effacement in exchange for spiritual comfort. The Hindu and Muslim masses are not antagonistic classes despite certain religious differences, but the 'haves', who have no religion except that of service through servitude, exploit the religious susceptibilities of unsophisticated millions.

In 1937 the Congress accepted office and came to power in the Hindu-majority provinces. It is true that where British interests were involved ministers had nothing to do, for they had no power. But they had an ample opportunity to rally Hindu and Muslim peasants by drastic land reforms. They refused to utilise that opportunity. In Bengal the Congress leadership, which was in opposition, took a line in respect of certain economic measures sponsored by the Muslim leaders, which left little or no doubt that they were not with the masses. Naturally the gullible Muslim masses fell a prey to the seductive embellishments of their privileged co-religionists. Compared to the Muslim League's reactionary but combative programme of Muslim revivalism the Congress leadership's mystic but negative cult was a damp squib; and the so-called nationalist Muslims, cut adrift in a world of confusion and uncertainty, were isolated from the bulk of the Muslim masses.

7. Gandhian Principles

During the first and early phase of his movement launched after the Jallinwallabagh massacre Gandhiji succeeded in bringing Hindus and Muslims on a common platform on the basis of a composite programme of non-cooperation and *khilafat*. In a way it was a good experiment of Hindu-Muslim cooperation in the pursuit of a common

ideal, but it failed to take roots because the khilafat was a movement for the restoration of a mediaeval Islamic anachronism which even the Turks under Kemal Pasha most energetically repudiated.

Without denying the credit due to him for his services it is important not to forget that Gandhiji stood for certain principles. For the last thirty years or more, the Indian nationalist movement has been influenced by those principles more than by any other programme or slogan. Gandhiji believed in compromise. He had aversion for what is known as the modern technique of speed and centralisation. He relied more on intuitive inspiration than on concrete historical phenomena. To him self-mortification was a better instrument of moral and social healing than punitive action or organised resistance to evil. He thought that the fortunate few were trustees of the unfortunate many, and not necessarily unscrupulous exploiters or appropriators of surplus value. He abhorred revolution, understood in its traditional sense, as being destructive of human values, and pinned his faith to the doctrine of pastoral gradualness.

Applied to concrete problems these meant (1) that the British withdrawal from the Indian scene should not involve injury to their interests; (2) that the Indian propertied classes and the Indian masses should join hands in a common constructive endeavour to their mutual benefit; (3) that national freedom was a means to an end, and not an end in itself, the end being good, simple and noble life; and (4) that where means came into conflict with the end, the end should be striven for, irrespective of the consequences, and however long and tedious the journey. Gandhiji's top-ranking followers grasped the first two with alacrity and enthusiasm, and rejected the third and fourth as being impracticable and utopian even in his lifetime. The Gandhian principles and the interpretations put upon them by his close associates led by Pandit Nehru, Sardar Patel and Sri Rajagopalachariar should be carefully examined and studied while critically examining the events that led to the partition of India and

transfer of power to the Congress and the League on the basis thereof.

It must be noted at the very outset that the change in the political scene of 1947 was due not to capture or seizure of power but to a transfer based on compromise, and that the compromise was a tripartite agreement between the British Government, the Congress leadership and the League High Command. It was not a popular, democratic deal. And a compromise, mind you, presupposes, on the one hand, agreement on fundamentals and, on the other, excludes any revolutionary social change.

8. The Muslim League's Bid for Pakistan

The Second World War broke out in September, 1939, and India was involved in it without her assent. In March, 1940, the Muslim League adopted at Lahore its famous resolution on Pakistan, although the expression 'Pakīstan' was not included in the text. It was, however, a resolution which was lacking in precision in regard to points of substance as well as to matters of procedure. The main propositions were clothed in phrases which are susceptible to more than one interpretation. The demand, for instance, was for the demarcation of the Muslim-majority areas in the north-western and eastern zones of India in such a manner that "they should be grouped to constitute independent States in which the constituent units should be autonomous and sovereign". It appeared to contemplate more than one independent Muslim State and autonomous and sovereign political entities as the constituent units of these independent States. Pakistan, as it has finally emerged, does not conform to this pattern.

In August, 1940, the British Government responded to the Muslim League's demand by stating, in the course of a White Paper entitled "India and the War", that they could not contemplate transfer of their responsibilities to any system of government "whose authority is directly denied by large and powerful elements in India's national life", and that they would not be "parties to the coercion

of such elements into submission to such a government". They conceded, nevertheless, that the framing of the constitution was primarily the responsibility of Indians themselves without prejudice, however, to Britain's imperial obligations arising out of her long connection with India.

In March, 1942, Prime Minister Churchill reiterated on behalf of the War Cabinet those propositions while announcing the Cripps Mission for the purpose of implementing British policy in consultation, on the spot, with Indian opinion. That policy, as Churchill observed, amounted to a promise that after the war India should attain Dominion status in full freedom and equality with Britain and the Dominions under a constitution to be framed by Indians by agreement amongst themselves, and acceptable to the main elements in the Indian national life. But he took care to repeat that this was subject (1) to the fulfilment of British obligations for the protection of minorities, including the depressed classes; (2) to the treaty obligations to the Indian States; and (3) to a settlement of certain other matters arising out of British connection with the fortunes of the Indian sub-continent. He suggested that the agreement the British Government had in mind would avoid alike an indefinite minority veto upon the wishes of the majority and a majority decision destructive of internal harmony.

Despite the British Government's disclaimer it amounted, in effect, to playing one community against another; the princes against their subjects and Indian leaders; and the British community and the services against the rest. Such a plan, whatever its intention, was bound to end in a fiasco, and in a fiasco it ended, as was demonstrated sometime later by the failure of the Cripps Mission.

9. The Cripps Scheme

The scheme that Cripps presented to Indian leaders on behalf of the Coalition War Cabinet proposed (1) that after the cessation of hostilities a constitution-making body would be set up to frame a new constitution for India; (2) that the entire membership of the lower houses of the provincial

legislatures would elect the constitution-making body by the system of proportional representation; (3) that Indian States would be invited to appoint representatives on the body; and (4) that the powers of the nominees of the Indian States and British Indian representatives would be the same.

The scheme conceded the right of any British Indian Province to keep out of the arrangement with power to accede afterwards, if it so desired. The British Government would be prepared to give the non-acceding provinces the same status as was proposed to be given to the Indian Union if they wanted to make separate arrangements. It further proposed a treaty between the British Government and the constitution-making body to cover all necessary matters arising out of the complete transfer of responsibility-matters which earlier had been specifically referred to by Churchill. It was intended to create India into a Dominion to which the Balfour formula of 1926, as embodied in the preamble to the Statute of Westminster of 1931, would apply fully and equally. It would, however, be open to the Indian Union, thus initially set up as a British Dominion, to decide in future its relationship to other member-States of the British Commonwealth. With the other part of the Cripps scheme, namely, that relating to the interim arrangements for the duration of hostilities I am not concerned, beyond pointing out that it offered no basis for honourable cooperation between the British Government and the Indian people for the prosecution of war.

The Cripps scheme failed to commend itself to acceptance by the Congress or by the League. The Congress opposition, as recorded in a resolution of the Working Committee in April, was halting and half-hearted except where it rejected the proposed war-time arrangements. In one or two particulars it was self-contradictory. On the one hand, the Congress reiterated its stand for "Indian freedom and unity", and disapproved of what it called the novel principle of non-accession for a province which, in its opinion, was a severe blow to the conception of Indian unity. On the other hand, it repudiated the suggestion

that it wanted to compel the people in any territorial unit to remain in the Indian Union against their declared and established will. For one thing, 'the right of non-accession' was, by no means, a 'novel principle'. As a matter of fact, that principle has generally been the basis of all federal systems. Even if it were a 'novel principle', how could the Congress oppose it consistently with its commitments as to the right of self-determination of the people of a particular territorial unit ? There was, however, no ambiguity in the Muslim League's opposition to the scheme. It was not prepared, as was made clear in resolution of its Working Committee, to accept any scheme unless it agreed to the principle of Pakistan as embodied in the Lahore resolution and the right of self-determination for Muslims.

10. The Famous 'Quit India' Decision and Rajaji Left Behind to Sow and Reap

All those fruitless negotiations occurred in the summer of 1942. In August at Gandhiji's instance the Congress passed at Bombay its now-famous 'Quit India' resolution. Linlithgow's Government manned, amongst others, by M. S. Aney and N. R. Sarker, both of whom subsequently earned high official distinction under the 'independent' Congress regime, reacted promptly and apparently ruthlessly by putting Gandhiji and other Congress leaders in jail, and inaugurating a regime of terror throughout the country.

Rajaji had earlier dissociated himself, presumably on grounds of conscience, from the Congress policy and was at large. He was left behind to sow and reap. He had free access to both the worlds—to the world, on one side, of Gandhian *truth and ahimsa* ; and to the world, on the other side, of Jinnah's Muslim self-determinism. In between the two worlds there was another world, yes, the world of privilege, plenty and patronage at Delhi, whose doors were kept ajar for the ubiquitous C. R. Like Devarshi Narada Rajaji kept on singing the music of peace on earth and goodwill to mankind. He evolved a formula for the settlement of the Hindu-Muslim question.

In the meantime Gandhiji came out of detention after a critical fast. He approved of the principle underlying Rajaji's formula which he presented to Jinnah in September, 1944, with certain modifications. It was proposed (1) that the areas should be demarcated by a commission approved by the Congress and the League; (2) that the wishes of the people in the demarcated areas should be ascertained on the basis of adult suffrage; (3) that the areas where the votes were in favour of separation should form a separate State after the elimination of British authority; (4) that there should be a treaty covering matters of common interest such as foreign affairs, defence, internal communications, customs, commerce and the like; and (5) that the treaty should also contain provisions for the protection of minorities. Jinnah rejected this formula because he thought that the offer was one of a 'truncated, maimed and moth-eaten' Pakistan.

11. Sensing of Social Upheavals in Asia

Meanwhile Germany was beaten, and the USSR gained in prestige throughout the world by its spectacular success at Stalingrad, the triumphant march of the Red Army towards Berlin and its magnificent contribution to the fall of that historic city. The western powers began to sense the danger of social upheavals in the south-east Asia theatre in the likely event of Japanese surrender. So in June, 1945, Viceroy Wavell came forward with a plan which was explained both in London and Delhi. It offered no solution of the long-term problem of the political future of India. It proposed, within the framework of the Government of India Act, an expansion of the Governor-General's Executive Council to make it "more representative of organised political opinion". The tasks of this enlarged Executive Council would be (1) to prosecute the war against Japan with the utmost energy till Japan was utterly defeated; (2) to carry on the British Indian Administration until a new agreed constitution came into force; and (3) to explore the means by which agreement about the future could be achieved.

Orders were issued for the immediate release of the members of the Congress Working Committee, and Gandhiji, Mr. Jinnah and leaders of the Sikhs and scheduled castes and a few others were invited to assemble at a conference at Simla to advise the Governor-General. I need not discuss the proceedings of that conference and the controversies that the proceedings provoked. What is important to note is that neither the Congress nor the Muslim League raised any objection to the principles underlying the Wavell plan except that the parties differed as to the quantum of representation for each party in the Executive Council. On that ground the conversations or negotiations broke down.

12. The Cabinet Mission's Scheme

In the meantime Labour came to power in Britain with a substantial majority in the House of Commons, and in March, 1946, Prime Minister Attlee announced the appointment of the Cabinet Mission who presented their proposals in May. The Mission rejected the demand for Pakistan not because they had no sympathy for the cause represented by the Muslim League, but because it was an unpractical proposition, and was likely to create more problems than it was expected to solve. They, however, gave a significant hint as to how the 'areas' in Bengal, the Punjab and Assam would be demarcated should there be two independent States in India, which later turned out to be the basis of partition of these three provinces. They proposed that there should be a Union of India, embracing both British India and the Indian States, which would deal with foreign affairs, defence and communications. All subjects other than the specified Union subjects, and all residuary subjects should vest in the provinces. The Indian States should retain all subjects and powers other than those ceded to the Union.

The constitution-making machinery should be set up on the basis of representation of each province in proportion to its population, roughly in the proportion of one to a million. The number of representatives allotted to each

community in a province should be elected by the members of that community in the Legislative Assembly. The allocation of seats between the main communities in each province should be in proportion to their population. The main communities for this purpose were 'General', Muslim and Sikh, the term 'General' including all persons other than Muslims or Sikhs. The constitution-making machinery would be divided into three sections—A, B and C. 'A', according to the scheme, was composed of Hindu-majority provinces whereas 'B' and 'C' embraced the Muslim-majority provinces in the north-west and in the north-east respectively.

After the preliminary meeting of the whole body the provincial representatives would divide up into these three sections and proceed to settle the constitutions for the provinces included in each section, and also decide whether any group constitution would be set up for those provinces. As soon as the constitutional arrangements came into operation, it would be open to every province to opt out of the group in accordance with the decision of its legislature after the first general election.

Indian States would get appropriate representation, the number, on the basis of population, not exceeding 93. The exact method of selection shall be decided by consultation. They should, however be represented in the Constituent Assembly in the preliminary stage by a negotiating committee. The representatives of the sections and the Indian States, it was proposed, would settle the Union Constitution. A treaty should be negotiated between the Union Constituent Assembly and Britain to cover matters arising out of Indo-British association. The Mission expressed the hope that India would remain within the British Commonwealth, conceding nevertheless that it was a matter for her alone to decide. As to the short-term part of the scheme, the Mission proposed the setting up of an interim Government having the support of the major political parties. Such a Government would work under the Government of India Act, subject to certain adaptations.

In July, 1946, the interim Government was formed with Pandit Nehru as Vice-President of the Executive Council "in terms of the existing Constitution", as Wavell made it clear in a New Delhi broadcast. The Congress refrained from pressing for amendment of the old, outmoded Act under which its representatives agreed to accept office. For a time the Muslim League kept out of the show but afterwards, on further reflections, they joined the Government. Nevertheless the controversy about the interpretation of the Cabinet Mission's scheme continued, and finally the representatives of the Muslim League dissociated themselves completely from the Constituent Assembly.

13. The Fixing of the Dateline by the Labour Government

In that national and international setting, Attlee made his famous announcement in Parliament in February, 1947. He stated that should a fully representative Constituent Assembly fail to prepare an agreed constitution on the basis of the Cabinet Mission's proposals by June, 1948, the British Government would consider "to whom the powers of the Central Government in British India should be handed over, on the due date, whether as a whole to some form of Central Government for British India, or in some areas to the existing Provincial Governments, or in such other way as may seem most reasonable and in the best interests of the Indian people". In regard to the Indian States, the British Government proposed that the Crown's paramountcy over them would be withdrawn even before the final transfer of power, making it clear at the same time that it would not be handed over to any Government of British India.

The British Government decided to negotiate agreements with those to whom power would be handed over in regard to matters arising out of the deed of transfer. They believed that British commercial and industrial interests would get a fair deal under the new conditions to the mutual advantage of both the parties. The wish was expressed that the constitutional changes envisaged in the

Labour Government's scheme would not lead to the termination of India's association with Britain. The appointment of Mountbatten, a person connected with the British Royal family and highly esteemed in reactionary circles, as Wavell's successor, was announced. It was proposed to entrust to him the task of transferring power to Indian hands.

Except fixing June, 1948, as the dateline for British withdrawal, there was practically nothing in the declaration which had not, explicitly or by implication, been covered by earlier statements made on behalf of the British Government, including the declaration of policy announced by Churchill's Government in August, 1940. There was, for instance, insistence on a communal settlement acceptable to them. There was some sort of a pledge as to the protection of vested interests such as those of the princes, the services and the British commercial and industrial community. There was a suggestion that India's connection with Britain should not be seriously disturbed. And yet, it must be admitted, the ultimatum of withdrawal by a specified date placed on the shoulders of the Congress and the Muslim League a responsibility which they dared not evade, having regard to the symptoms of mass upheavals in different parts of the country.

The British Labour Government with the apparent approval of the Conservative Opposition repudiated the representative character of the Constituent Assembly which had started functioning without the Muslim representatives. Having gained this point, the Muslim League were encouraged to believe that they could now achieve Pakistan in some form or other. With no social programme to rally the masses, including the Muslims, on their side the Congress High Command thought, contrary to Gandhiji's advice, that partition was inevitable. But the executives of both the organisations wanted power lest the progressive forces should combine and mobilise themselves in such a manner that the ambitions of the upper strata of society were frustrated and their aims completely defeated. The British Government felt that if they

had to quit under the compulsion of events, they must seize the opportunity to lay the foundations of a collaborationist Commonwealth enterprise. And Mountbatten, with high social and political connections and some prestige by virtue of his South-East Asia Command during the war behind him, was just the man to halt the drift and stabilise the situation.

14. The Congress Votes for Partition in a Scramble for 'Spoils'

In these circumstances the Congress Working Committee met at Delhi in March, 1947, and placed on record their condemnation of the "horrors and tragedies" which India had witnessed during the last seven months. They then reconciled themselves, contrary to their past professions and against the advice of Gandhiji, to the division of the Punjab into two provinces, "so that the predominantly Muslim part may be separated from the predominantly non-Muslim part". As a logical sequel came the Congress-sponsored proposal for the division of Bengal, which was approved by Hindus in East and West Bengal and the so-called nationalist Press. These moves strengthened the hands of Mountbatten, and armed with the powers of attorney from the Congress and Muslim League leaders he persuaded the British Labour Government to make a declaration in June, 1947, offering to transfer power earlier than the dateline, fixed in their previous statement.

A procedure was outlined in the declaration, whereby to ascertain the wishes of the areas concerned on the issue whether their constitution was to be framed (a) in the existing Constituent Assembly, or (b) in a new and separate Constituent Assembly consisting of their representatives only. The procedure proposed was to this effect: the Legislative Assemblies of Bengal and the Punjab would each meet in two parts, one representing the Muslim majority districts and the other the rest of the province. If a simple majority of either part voted for partition of the province, partition would take place. Before the question as to

partition was decided, a meeting of all the members of the Assembly (other than Europeans) would be summoned if any member of the Assembly concerned so demanded, with a view to deciding which Constituent Assembly the province would join should both the parts agree to remain united. In the event of partition being decided upon, each part would decide which of the two Constituent Assemblies it would join. The Legislative Assembly of Sind was empowered at a special meeting to decide whether the province would join one or other Constituent Assembly. Like power was given to British Baluchistan.

One will notice that there was no question of a popular plebiscite on the issue of partition as regards Bengal, the Punjab, Sind and British Baluchistan where, in each case, the Muslim members had a majority against the anti-partitionists. In the North-West Frontier Province the situation was different. The majority of the members, Muslim or other, were avowed and unambiguous anti-partitionists, whose two representatives out of three had joined the Constituent Assembly set up in terms of the Cabinet Mission's scheme. So the British Government proposed a different procedure for that province, of course, they did it not without assigning reasons. And what were the reasons they put forward? They laid stress on the geographical position of the province. They spoke of 'other considerations' as well.

15. The British Plan Influenced by Strategic Considerations

Finally the British Government took the view that if the whole or any part of the Punjab decided not to join the then existing Constituent Assembly, it would be necessary to give the North-West Frontier an opportunity to reconsider its position, that is, an opportunity to recall its representatives from the Constituent Assembly, and to dissociate itself from a united India. Accordingly they proposed that in the event of any part of the Punjab going in for partition the electors of the Frontier Assembly would decide,

on referendum, whether they would join this body or that. If as is clear, it was the view of the British Government that it was neither safe nor desirable for the Frontier to remain attached to the Indian Union with a large belt of Pakistani territory cutting it out of the rest of India, the same consideration applied with greater force against the eastern districts of Bengal being isolated from Pakistan by hundreds of miles. What was sauce for the East Bengal goose was not sauce for the Frontier gander. The fact is that British and other reactionary interests demanded that strategic border areas must be kept, by any means, outside the influence of progressive forces.

Provision for a similar referendum was made in the case of Sylhet, which was then part of the Hindu-majority province of Assam. If any part of Bengal joined Pakistan, the district of Sylhet and contiguous Muslim-majority areas of adjoining districts of Assam should be given an opportunity to attach themselves to the seceding part. If, on the contrary, Bengal decided in favour of a united India, there would be no change in the territory of Assam. It was, as the British Government posed it, plainly an issue between Hindus and Muslims, and not between one linguistic and cultural group and another; and the Congress leadership, in their eagerness to have their share of the 'spoils', swallowed this sugarcoated pill.

In the case of the entire North- West Frontier Province and Sylhet the issue had to be decided by referendum, whereas for Bengal and the Punjab the decision had to be taken by their respective Assemblies. In the North-West Frontier, and Assam of which Sylhet was an integral part, the Muslim League was not in command of a majority in the Assemblies, and hence perhaps the referendum. By contrast, the Muslim League dominated the Assemblies both in Bengal and the Punjab, and hence perhaps the Assembly decision. Even then the procedure adopted for the North-West Frontier and Sylhet and the Assam areas was, by no standard, a popular and democratic plebiscite, the referendum being made to a small percentage of the entire adult population. But there was not the slightest

justification for according differential treatment to the electors of Bengal and the Punjab. This creates the impression that the authors of the scheme and its Indian supporters had doubts as to the verdict of the majority of the electorate in these two provinces restricted in size, as it was, by property and other qualifications. Despite their repudiation of the representative character of the Constituent Assembly the British Government expressed their intention not to interrupt its work for the non-seceding areas. All this was about what was then known as British India. So far as the Indian States were concerned, the policy contained in the Cabinet Mission's scheme remained unaltered. The Congress and the Muslim League, on the whole, approved of the Attlee Government's plan.

16. The British Imperialist Triumphs

One is entitled to deduce certain conclusions from this tripartite agreement. First, the conception of India as a national political entity was negated by the British Government in concurrence with the Congress and League leaders. The principle was established that political divisions must, as far as possible, conform to territorial divisions on a religious basis, a policy which had been diligently and consistently pursued by the British imperialists since 1905. On this count Jinnah won, and the Congress had to go back upon what it had professedly fought for during so many eventful years. Culture and all that it implied followed religion, a medieval concept which the Congress leadership accepted without apparent qualms of conscience. Second, guarantees as to the protection of the interests of the princes, the services and British trade, commerce and industry, were conditions precedent to the transfer of power, although the nature of such conditions was not clearly specified in the document evidently to avoid public denunciation of the *bona fides* of the leaders. This was a triumph of Churchill's policy announced on more than one occasion since 1940. Third, British connection was the basis on which to start the new experiment in the seceding areas as well as in the residuary

part of India. It was, of course, left open to them to decide, at the time of constitution-making in each case, whether or not they would sever that connection. Here, again, it was Churchill's policy, as laid down in the Cripps scheme of 1942, which the Congress and League leaders had rejected as falling miserably short of the public demand. Fourth, the Constituent Assemblies were not, in any sense, people's revolutionary committees set up by them on seizure of power from their oppressors and exploiters, but were, on the contrary, in the nature of make-shift arrangements made and sanctioned by the British Government on the basis of the restricted franchise provided for under the Government of India Act, 1935. This, too, marked no departure from British policy pursued in the case of the older Dominions, or from the Churchillian category, or even from Irwin's bombast which the Congress had repudiated at Lahore in 1929-30 under Jawaharlal's leadership. Fifth and last, in taking such a grave decision involving, as it did, the repudiation of Indian national unity, and acceptance of the principle of political redistribution of territories with reference to religion, the wishes of the people were completely ignored, if not deliberately disregarded.

17. The Indian Independence Act, a Deed of Compromise

The policy contained in the British Government's June declaration was given statutory expression in the Indian Independence Act passed by the British Parliament in July, 1947. By this Act two independent Dominions, to be known respectively as India and Pakistan, were set up as from the 15th day of August, 1947. A broad outline of the territorial division of British India had already been given, and the Act specified a provisional list of Bengal and Punjab districts, which were included in East Bengal and West Punjab respectively, subject to modifications by the award of a boundary commission appointed by the Governor-General (sections 2-4, and schedules 1-2). The 'award' meant not the unanimous decision of the commission or even its

majority decision, but the decision of the Chairman who was a Briton.

The Legislature of each of the Dominions was given full power to make laws for that Dominion, including laws of extra-territorial operation (section 6). All savings in British Acts and laws as incorporated in the Government of India Act, 1935, were deleted. No law passed by a Dominion Legislature would be vitiated by its repugnancy to any British Act, law, or order. No Act of the British Parliament would extend to either of the Dominions as part of the law of that Dominion unless it was extended thereto by a law of the Legislature of the Dominion. The power of a Dominion Legislature included the power to amend or repeal any British Act, law or order.

The British Government surrendered all their responsibility for the government of the territories which had been included in British India (section 7). The Crown's paramountcy over the Indian States lapsed, and with it all treaties and agreements between the King and the rulers of States. Also the treaties or agreements between the King and any persons in the tribal areas also lapsed. Appointed by the King, the Governor-General had no power to act in his discretion or in the exercise of his individual judgment (sections 5 and 9). The Constituent Assembly of each Dominion, apart from its powers in that capacity, would also exercise powers as its Legislature. The words 'Indian Emperor' and the words 'Emperor of India' were omitted from the Royal style and titles (section 7). Each of the Dominions and all provinces and other parts would be governed, as nearly as possible, in accordance with the Government of India Act, 1935, subject to such consequential changes as were necessitated by the new constitutional position.

The Governor-General was empowered by order to make such provision as appeared to him necessary or expedient for bringing the Independence Act into operation. The arrangements made would apply separately in relation to each of the Dominions, and nothing in the

Act would be construed as continuing on or after the 15th August, 1947, any Central Government or Legislature common to both the Dominions (sections 8 and 9). The guarantees were given in the Act to the personnel of the services recruited by the Secretary of State or the Secretary of State in Council and to the judges of the Federal Court or of any High Court in respect of remuneration, leave, pension etc. (section 10).

It was laid down by the Indian Independence (International Arrangements) Order, 1947, that membership of all international organisations together with the rights and obligations attaching to such membership would devolve solely upon the Dominion of India. The Dominion of Pakistan was free to take such steps as it deemed necessary to apply for membership of any international organisation it chose to join. Thus India's membership of the United Nations and the rights and obligations accruing therefrom devolved, as a matter of course, on the Dominion of India to the exclusion of the Dominion of Pakistan. Pakistan became a member subsequently with Indian support.

18. The Independence Act and the Statute of Westminster Compared

I should now say a few words by way of comparing the Indian Independence Act, 1947, with the Statute of Westminster, 1931. The term 'Dominion' has nowhere been defined except that 'Dominion' means, as under section 1 of the Statute, any of the countries mentioned in that section. 'Dominion status' has been explained in the Balfour formula of 1926, which is partially reproduced in the preamble to the Statute. The recital is to this effect : "They (Great Britain and the Dominions) are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of' their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations". The formulation is not susceptible of juridical treatment. It is a political or constitutional conundrum, and not strictly

a legal concept. It implies, however, (1) the common allegiance of these countries to the British Crown ; (2) the freedom of association united by that common allegiance, and (3) the equality of status, not necessarily of functions, between them in every aspect of domestic and external affairs.

The expressions "common allegiance" and "free association" seem to contradict each other. For, if members are bound by allegiance to the Crown, the voluntary character of the association is in doubt. It may as well mean that the voluntary character of the association controls allegiance so that each member is entitled, by unilateral act, to destroy that allegiance. That the formula is flexible was demonstrated by the refusal of the Irish Free State in 1939 to involve itself in the Second World War ; its elimination of the Crown in regard to its internal affairs by the Executive Authority (External Relations) Act, 1936 ; and its provision for the elected President to replace the Governor-General as Head of the State by the Constitution Act, 1937.

Now, while the right to eliminate the Crown might be implicit in the Statute of Westminster, it is clearly recognised in the Indian Independence Act. That is the first point of difference between these two British Acts. Coupled with this may be noted the specific provision of the Indian Independence Act that from the 15th August, 1947, His Majesty's Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that date, were included in British India (section 7). The Statute contains no such provision. From this some commentators seem to have inferred that the British Government's superintendence, direction and control over the Governments of the Dominions under the Statute of Westminster remained, whereas both India and Pakistan became entirely free from the British Government's authority in any respect whatsoever. This is not a correct interpretation. The Statute, it should be remembered, was no formulation of new policy ; it was instead a record, in part, of the relations which, in fact, had already been established by

conventions between the United Kingdom and the Dominions. As a matter of fact, the British Government's responsibility in respect of the Dominions had long ceased, and it was not considered necessary to state that universally recognised practice as a proposition of law.

No act of Parliament passed after the commencement of the Statute extends to a Dominion as part of its law unless it is expressly declared in the Act that the Dominion concerned has "requested, and consented to, the enactment thereof" (section 4). The Indian Independence Act, on the contrary, excludes the applicability of any British Act passed on or after the 15th August, 1947, to India or to Pakistan, as the case may be, unless it is extended thereto by a law of the Legislature of the Dominion (section 6). The Statute implies, if in a remote way, the continuation of sovereignty of the British Parliament over the Dominions, whereas the Indian Independence Act eliminates it, so far as the Dominions of India and Pakistan are concerned. Incidentally, it does not mean, however, as is suggested by the expression "as part of the law of the Dominion", that British laws would not have that operation which the comity of nations allows the laws of every country to have in the territory of every other country. All that is meant is that they are not part of the law of the country, and yet they may be respected. The second point of difference between the Indian Act and the Statute, therefore, lies in the fact that whereas for India and Pakistan the British Parliamentary sovereignty has been completely eliminated the Statute leaves the issue in doubt as regards the older Dominions. It seems, however, that this difference is *proforma* rather than substantial.

The third point of difference is that while under the Statute there are savings for certain British Acts in respect of Canada, Australia and the Australian States and New Zealand (sections 7-9), the Indian Independence Act makes no such reservations. It must, however, be noted that the savings do not apply to the Union of South Africa. Nor did they extend to the Irish Free State. That means that unlike Canada, Australia and New Zealand,

these States were presumably free under the Statute to amend or repeal any British Act in so far as it applied to them. In this respect the position of the Dominions of India and Pakistan is virtually the same as that of the latter States under the Statute. But the savings for British laws under the Statute were inserted with the approval of the Dominions concerned with a view to protecting the distribution of powers between the Central authorities and the constituent units. These were terms of voluntary agreement rather than symbols of British Parliamentary sovereignty. Whatever the points of similarity or difference between the Statute and the Independence Act, the broad fact remained that neither of these British laws destroyed or purported to destroy allegiance to the British monarch.

19. The Congress 'Deal' with Princes

After India became a Dominion its Central Government proceeded to take up the question of the Indian States which had been left in a fluid state. They were no longer under the paramountcy of the Crown. They were not placed under the sovereignty of any of the two Dominion Governments. They had never, in any period of history, been sovereign States at international law either. Consequently, they had no alternative, as the British Government themselves suggested, but to accede either to India or to Pakistan, having regard to their geographical proximity, historical association, cultural affinity and similar other considerations. But certain princes dreamed of independent sovereignty for themselves. They were encouraged in this respect by the Cabinet Mission's memorandum on the treaties and paramountcy issued in May, 1946, in which it was stated *inter alia* that "all the rights surrendered by the States to the paramount power will return to the States." It was, however, pointed out in the memorandum that the void created by the withdrawal of the Crown's paramountcy "will have to be filled either by the States entering into federal relationship with the successor Government or Governments in British India, or

failing this, entering into particular political arrangements with it or them”.

The princes were rulers by sufferance, although the people in their territories and within their jurisdiction owed allegiance to them and were internally their subjects. They were entitled to British protection abroad, and there was little doubt about their allegiance to the British monarch. But for the purposes of the Government of India Act the rulers and their subjects were not British subjects and, except where special provisions were made, were not entitled to political rights such as franchise and eligibility for membership of the legislatures and services under the Crown in British India. This was an anomalous position, which created in the minds of some rulers that with the lapsing of the Crown's paramountcy, they were restored to full sovereignty.

The Government of India Act, 1935, was amended by the British Parliament in terms of the Indian Independence Act. Provision was made for accession of the Indian States to the one or the other Dominion. An Indian State was deemed to have acceded to the Dominion if the relevant Governor-General had signified his acceptance to the instrument of accession executed by the ruler concerned (section 6). In accordance with this provision the rulers of a large number of States executed instruments of accession which the Governor-General of the Indian Dominion accepted. One of the terms of each instrument was that it would not affect the ruler's sovereignty in and over his State. A schedule was attached to each instrument specifying the matters in respect of which the Dominion Legislature could make laws for the acceding State. The legislative authority of the Dominion under this agreement extended to defence, external affairs and communications.

A standstill agreement was then concluded between each acceding State and the Government of India. The recital was to the effect : “Until new arrangements in this behalf are made, all agreements and administrative arrangements as to matters of common concern now existing

between the Crown and any Indian State shall, in so far as may be appropriate, continue, as between the Dominion of India or, as the case may be, the part thereof and the State." A guarantee was given that the standstill agreement did not include the exercise of any paramountcy functions by the Dominion Government. In this case, too, a schedule was attached specifying the matters in respect of which the previous arrangements would continue. It covered, broadly speaking, such subjects as air communications, railways, customs, external affairs, currency and coinage, import and export control.

The standstill agreements were followed by agreements as to integration of certain small States with the adjoining provinces, for example, the Orissa and Chattisgarh States, and by covenants for the formation of Unions of States such as Pepsu, Vindhya Pradesh etc. It was a common feature of each one of these covenants that guarantees were given as to the succession to the *gadi* and the personal rights, privileges, dignities and titles of the ruler. Each of the Unions of States executed a fresh instrument of accession, replacing the earlier instruments of the individual rulers. The Rajpramukh in each case, who executed the instrument on behalf of the Union, acceded in respect of all matters included in List I and List III of the seventh schedule to the Government of India Act, 1935, except matters relating to taxation.

Subsequently steps were taken in January, 1949, by the Constituent Assembly amending the Government of India Act so that certain States could be administered as a chief commissioner's province or as part of governor's or chief commissioner's province. In terms of the amendment and under its authority the Governor-General promulgated in July, 1949, 'an Order called the States' Merger (Governor's Province) Order. It provided *inter alia* (1) that a merged State would be administered in all respects as if it formed part of the province in which it was merged ; (2) that any reference to an acceding State in any Act, ordinance or order would not include a reference to any merged State ; and (3) that any such reference to a

province in which a State had been merged would include the territory of the merged State.

20. Kashmir & Hyderabad

The vast majority of five hundred and odd Indian States acceded to the Indian Dominion. Several of them were constituted into unions by covenants. The smaller ones were, with few exceptions, merged in the contiguous provinces. Mysore, which was also an acceding State, remained or was allowed to remain a constituent unit by itself. Two big States, namely, Kashmir (Jammu and Kashmir) and Hyderabad, declined to accede either to India or to Pakistan, and were watching the situation. But following a raid, or in consequence thereof, the Maharajah of Jammu and Kashmir, with the concurrence of the State's popular representatives led by Sheikh Abdulla, now in detention, executed an instrument of accession which Governor-General Mountbatten accepted on behalf of the Government of India in full conformity with the terms laid down by the amended Government of India Act, 1935 (section 6). The Governor-General's acceptance of the Jammu and Kashmir instrument was followed by Prime Minister Nehru's declaration that the future destiny of the State would be decided by its people through a democratic plebiscite when normal conditions were restored, a step which has since been attacked in certain quarters as giving rise to what looks like an interminable conflict between India and Pakistan. The issue has been pending before the United Nations for about five years with no prospect of a settlement in the near or distant future. The result is that India has been manoeuvred into acquiescing in Pakistan's contention, apparently supported by Britain and the USA, that the State's accession is still an open question despite Nehru's declarations to the contrary and its inclusion into the Indian Union as a Part B State under the new Constitution.

Hyderabad acceded to India later on, but not before successful police action initiated by the Government of India had convinced the recalcitrants and

communalist zealots that no challenge to the peace and security of India would be tolerated. With Mysore, and Jammu and Kashmir, Hyderabad is now a Part B State. Pakistan seems to nurse a grievance over the accession of Hyderabad to India, but it is nevertheless clear that she has no alternative but to reconcile herself to an accomplished fact. Thus from the 15th August, 1947, to the 25th January, 1950, India functioned as a Dominion with a jurisdiction extending to all the British Indian territories except the Pakistani part of those territories, but including the territories of the acceding and merged Indian States. The allegiance to the British monarch, however, remained unaltered and with the Independence Act and inspite of it we continued to be British subjects both at home and abroad.

21. The Price for 'Independent Dominion'

We started as an 'independent Dominion', it should be further noted, by fulfilling all the requirements insisted on by Churchill in 1940, and since reiterated by the British Government irrespective of their political affiliations or social sympathies. We agreed to partition on the basis of religion as a price for the Muslim League's withdrawal of its political veto. We gave guarantees to the princes who had to their credit a record of loyal and devoted service to the British cause in peace or in war. We provided safeguards for the protection of the interests of the services who had been worthy agents of worthy masters. We dared not touch, far less disturb, that stately edifice of material and moral progress which British enterprise in trade, industry and business had built in this mysterious land of princes, fakirs and mystics. We did all this, and then settled down to projecting our hopes and aspirations into a solemn document and giving unto ourselves the power to govern ourselves. An endeavour will be made in the next few chapters to examine how far we have proved true to our pledges and where we have failed.

CHAPTER VIII

INDIA AS A SOVEREIGN, DEMOCRATIC REPUBLIC

1. The British Crown's Prerogatives

The usual practice among specialists and the lay public alike is to refer to the preamble of our constitution to describe or explain the political status and character of the Indian Union. The recital is to the effect: "We, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a Sovereign Democratic Republic...in OUR Constituent Assembly...do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION." Nowhere in the text of this the longest constitutional document in history is the expression 'Republic' used. This is significant from political, constitutional and legal points of view.

The preamble may be used to explain what is ambiguous in the enactment, and to restrain or extend it as best suits the intention. It may explain the intention of a statute but not its meaning, particularly where the text is explicit. It is a well-known legal maxim, recognised uniformly by the courts, that the preamble does not control a statute and that where any provision of the statute comes into conflict with the preamble the latter is superseded to the extent of conflict. Again, a 'solemn resolve' may not conform to practice and, for positive direction of policy, one has to search for the specific constitutional provisions as well as for acts done by the State or its organs in respect of its internal affairs and external relations. The fact that the Constituent Assembly, which has framed our constitution, was itself a creature of the British statute, it should be noted, is of some significance as throwing light on the political and social background of the institutional changes that have since been effected, and on their qualitative character.

Of course, a Proclamation was issued by order of the President on the 26th January 1950, declaring India a Republic. It was laid down in the Proclamation, however, that "the Union and its component units, the States, shall exercise all powers and function of Government and administration in accordance with the provisions" of the constitution. No more is to be gathered from this order than what is contained in the preamble. It is true that all reference to the Queen of England has been eliminated from all Indian laws, including the codes and other statutes. Nor does any mention of the British monarch occur in the constitution. Further, the Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments supplementing the latter Act, but not including the Abolition of the Privy Council Jurisdiction Act, 1949, have been replaced by or under article 395. This repeal, it may be argued, constitutes an affirmative repudiation of the British monarch's legal sovereignty in, or in respect of, the Indian Union. The prerogatives of the Queen, which were retained under the Government of India Act, 1935, read with the Indian Independence Act, have been eliminated, though not in positive terms.

Incidentally, one or two questions arise in this connection. What is a prerogative? How, in what respects and to what extent was it exercisable in India? The prerogative, according to English law, is the residuary of the ancient customary powers of the Crown. It is traced to different sources. First, in ancient times, the fiction had been invented, as part of a juridical and ideological superstructure, that the monarch possessed, by divine will, the attributes of perpetuity and perfection of judgment, which under the bourgeois system, by the way, are ascribed to the State by a certain school of thinkers and philosophers. It is the old feudal wine in a new bourgeois bottle. From this has come the idea underlying the familiar English refrain: "The King is dead; long live the King". It also accounts for the maxim: "The King can do no wrong". According to this legal fiction, the King is the fountain of justice. The prerogative of mercy exercisable

by the King is traceable to this theory. That prerogative of the English monarch was not disturbed by the Indian Independence Act, but in so far as the present constitution has vested in the President (article 72) or other authorities (article 161 and Part VII) the power to grant pardons or reprieves, it may interpreted as having destroyed the Crown's prerogative in this respect.

Second, the prerogative may be traced to the King's position as the feudal chief. All the land in British India was vested in the Crown as the ultimate owner. Gold and silver mines belonged to the Crown. It enjoyed escheats of land, treasure trove and the separate property of persons dying intestate without kin. These rules of English common law no longer apply to India in view of the specific provisions of the constitution (articles 296-297). Third, in early times the entire authority of the State belonged to the monarch, and the residue of that authority is still exercised by the Crown where it has not been superseded by positive law. Acts such as the annexation of territory, cession of territory, appointment of diplomatic representatives accredited to foreign States are done by the Crown in exercise of this residual executive authority. These prerogatives no longer extend to India having regard to the fact that the constitution or the orders made thereunder empower the President or Parliament, as the case may be, to deal with these matters.

The British Crown acquired these prerogative rights and powers in British India by conquest, cession or English common law. Having succeeded to all the rights of the East India Company as well as to those of India's late sovereigns the Crown came to exercise more prerogative rights in British India than even in the United Kingdom. For instance, it had more power in this country over lands and minerals, as was held in the case of *Suleman v. Secretary of State in Council*, than it had under the English common law. All these prerogatives have now under our constitution been eliminated, including the prerogative to confer titles.

2. Responsibility for War and Peace

Nevertheless doubt seems to exist as regards the prerogative power with respect to war, peace and neutrality until it is clear that the Queen has absolutely no *locus standi* in the Indian political system. There are, of course, certain entries in List I of the Seventh Schedule to the Constitution which may be construed as having eliminated the British monarch from the Indian scene in these respects. Entry 1 mentions defence of India, including preparation of defence and all such acts as may be conducive, in times of war, to its prosecution, and after its termination, to effective demobilisation. Entry 15 mentions war and peace. Entry 11 mentions diplomatic, consular and trade representation. Entry 10 mentions foreign affairs, that is, all matters which bring the Union into relation with any foreign country. All this, on the face of it, constitutes what they call the sovereignty of the Indian Union, for if a State is competent to legislate with respect to war and peace and foreign affairs there is no doubt about its sovereignty.

But the question is: do these entries by themselves prove that except for the symbolic value of the institution of monarchy our Republic has no connection with the Queen ? A correct answer to this question depends on an examination of historical precedents in British constitutional law as well as on the precise implications of these entries. I shall not cite in this connection the corresponding powers of the Legislatures of the Dominion of Canada and of the Commonwealth of Australia, for the Queen is still part of these Legislatures. But the case of Southern Ireland or Eire, as it was then known, furnishes a parallel.

Take the Irish Constitution of 1937. It provides that no international agreement "shall be part of the domestic law of the State save as may be determined by the Oireachtas". It states that Ireland accepts "the generally accepted principles of international law as its rule of conduct in its relations with other States" (article 29). This is about the legislative power.

Provision is then made that the executive power of the State in connection with its external relations shall be exercised by, or on the authority of, the Government. It is laid down that war shall not be declared and the State shall not participate in any war save with the assent of the Dail Eireann. In the case of actual invasion, however, the Government may take whatever steps they may consider necessary for the protection of the State (article 28).

In spite of those clear and specific constitutional provisions the British monarch remained part of the Irish constitutional system in respect of protection of its citizens abroad and from the point of view of allegiance as such to the Crown until 1949, when Eire ceased to be part of the Queen's dominions, subject to certain reservations relating to the British Nationality Act. The Irish Republic is an independent, though not a foreign, country in relation to Britain. It is independent because it has ceased to be part of the Queen's dominions. It is not a foreign State because, by mutual consent, it has been decided that the status of Irish citizens as British subjects employed in the Crown's service or otherwise engaged in the United Kingdom and colonies shall not be disturbed.

Ireland, it may be recalled, refused to be involved in the Second World War that broke out in 1939, and remained neutral in exercise of the power referred to above. Ireland was still then a Dominion in terms of the Statute of Westminster, read with the Constitution of 1937. Neutrality was one thing, but declaration of war against the King was another. Could Ireland join Germany in the war? It could not in law, because as Ireland had not ceased to be part of the King's dominions the declaration of war was still the King's prerogative. The King could not be at war with himself. That would be a political and legal absurdity.

It seems that the position has, changed since 1949, having regard to the provisions of the Republic of Ireland Act. 1948 (Irish), and of the Ireland Act. 1949 (British).

The Republic of Ireland seems free now to declare war in its own right, although war against Great Britain, that is, against the British Queen would place the Irish citizens, particularly those employed in the service of the Crown, in an extremely delicate and anomalous position. By agreement, which has been recognised in the relevant British Act, the Irish citizens are still governed by the British Nationality Act, 1948, and are not foreigners or aliens in the United Kingdom and its colonies. Perhaps the result in the event of an Anglo-Irish war would be this: such of the Irish citizens as prefer to continue as British subjects would lose their Irish citizenship, whereas those who want to continue as Irish citizens would be treated in the United Kingdom as enemy aliens.

I have gone into these questions at length just to show that the entries in List I of the Seventh Schedule to the Indian Constitution do not by themselves, on Irish analogy, eliminate the British monarch unless it is clearly laid down by competent legislation, as in the case of Burma or of the Republic of Ireland, that the Indian Union has ceased to form part of the Queen's dominions. From this comes the next question: is the Indian Union, our sovereign democratic Republic, free to go to war against Britain or any other Commonwealth State ? The answer is that it cannot, so long as our present constitution stands as it does, and so long as our relations with the Commonwealth and with the Queen as its symbolic head are not competently and appropriately severed. Well, I am not suggesting that the Indian Union should declare war against Britain or any other Commonwealth country. I am trying to explain the legal implications of our membership of the 'free association' known as the Commonwealth. I contend that in a war in which Britain is or may be involved the Indian Union may remain neutral but will not be free to make common cause with Britain's enemy.

3. The Issue of Elimination of the Crown in Doubt

So, this glib talk of war between India and Pakistan over this issue or that issue, apart from its dangerous and

mischievous social consequences, ignores the legal and political nexus between India and Pakistan and, for that matter, between India and any other Commonwealth State. That nexus is not merely of a ceremonial nature. It is maxim of English law that the Queen's dominion does not cease save by competent legislation, or by act of successful revolt internationally recognised. Whatever might have been the nature or character of the source of British power in India, we never challenged seriously the legality of the Queen's sovereignty after her assumption of direct rule in 1858. Have we now eliminated the Queen completely? Does the President's Proclamation declaring India a Republic by itself amount to such elimination? Can the elimination of the Crown's prerogatives in certain respects by constitutional provisions be construed as having done away with the Queen's legal sovereignty? Has that sovereignty or at least its function been completely destroyed by the repeal of the Indian Independence Act, 1947, the Government of India Act, 1935, and the other relevant statutes? It is difficult to give adequate and satisfactory answers to these questions having regard to the fact that we have not destroyed it by successful revolt, or by any specific constitutional provision declaring that our country has ceased to be part of the Queen's dominions. At any rate, the issue is in doubt.

We solemnly proclaim that our country is a Republic. But why do we not proclaim at the same time that our country is out of the Commonwealth and that she recognises no King or Queen even as a symbolic head? There is, of course, no question as to India's right to secede from the Commonwealth. That right, however, she has not come to possess for the first time under the present constitution. It was conferred on her as well as on Pakistan by the Indian Independence Act, 1947, which was a British enactment. The question is: why should the Government of India, like their Pakistani counterpart, fight shy of exercising that right?

One or two instances may be cited by way of elucidation of the Indian Union's exact legal position. In the wake of

the American War of Independence a declaration was made on the 4th July, 1776, to the effect: "That these united colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British Crown, and that all political communication between them and the State of Great Britain is and ought to be totally dissolved; and that as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do." No such or similar declaration is on record in any of our post-independence constitutional documents.

It may be said, as has often been said, that ours has been a peaceful and non-violent revolution involving no bloodshed, no hatred and nothing of the kind, and that by having wrought a change of heart among the alien rulers we have persuaded them to transfer power to us. We have thus set a unique example in the history of mankind, it is claimed, of how non-violence can work miracles in the affairs of human institutions. Those, who argue this way, do not look beyond their nose. Power was transferred in India to the Congress and in Pakistan to the Muslim League. Unlike the Congress, the Muslim League had never been committed to the creed of non-violence. How then could the League wrest power from the British governing class ? The causes responsible for the change in the political scene in 1947 were many and varied, national as well as international. Without going into those causes one may say that the deed of transfer was based on a triangular compromise between the British ruling class, the Congress and the Muslim League, inspired by considerations which the impact of events during the last five years has helped lay bare.

4. The Significance of Certain British Acts

Take another instance : Burma. You will find that section 1 (1) of the Burma Independence Act, 1947, states that on and from the 14th January, 1948, "Burma shall become an independent country, neither forming part of His Majesty's dominions nor entitled to His

Majesty's protection". It is followed by a provision, as under section 2 (1), that from the relevant date Burmans cease to be British subjects. One misses such or similar provisions from the Indian Independence Act of 1947, and what is more curious, from the Indian Constitution of 1950, which our Constituent Assembly has given to the country. On the other hand, certain provisions of the British Nationality Act, 1948, and of the India (Consequential Provision) Act, 1949, which were dealt with in Chapter II, show that India's membership of the Commonwealth and her acknowledgement of the British Queen as the symbolic Head of the Commonwealth are not merely formal platitudinous gestures.

They reveal a continuous process of readjustment of relations which changes in history may call for. They explain why we discuss our own defence in the interest of east-west collaboration and of world strategy, consider and investigate our economic and financial problems, and debate and deliberate upon the rights and wrongs of nations at the regular sessions of the Commonwealth Prime Ministers' Conference in which, for obvious reasons, Britain plays the leading role. As Mao pointed out to his people after the liberation of the Chinese mainland, in the present world setting a country must lean to this side or to the other—to the side of socialism or to the side of imperialism, whatever its new name. Neutrality is a camouflage ; a third road does not exist. A third area is only empty sound. There is no denying the fact that both India and Pakistan under the Congress and Muslim League leaderships respectively have leaned to the side of the Commonwealth, despite occasional bickerings and recriminations. And the world knows what the Commonwealth stands for. It is, of course, common ground that no British law extends to India and, for the matter of that, to Pakistan unless it is extended to it by its own legislation.

What, then, it may be asked, is the significance of these two British Acts, namely, the British Nationality Act, 1948, and the India (Consequential Provision) Act, 1949? It means that an Indian citizen, while in the United

Kingdom and colonies, has the status of a British subject. It means, to cite a concrete case, that in London even Pandit Nehru, the Indian Republic's Prime Minister, is a British subject with all that expression implies. It means, to cite another concrete example, that Lord Sinha, who is an Indian citizen in terms of our constitution, retains his British peerage and his seat in the House of Lords.

In our own country, too, recourse has been had to what I should like to call a political hide-and-seek game. Article 367 (3) of the constitution, for instance, lays down that a 'foreign State' means any State other than India. According to this definition Pakistan, Britain, Canada, Australia, South Africa and Ceylon are foreign States for the purposes of the constitution. But no, they are not. For, to this definition there is a proviso which says that the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order. An order was accordingly issued declaring the Commonwealth States not to be foreign States. [The Constitution (Declaration as to Foreign States) Order, 1950.] That order still stands, and there is nothing to indicate that Parliament is going to alter or amend it. The result is that, to us Burma is a foreign State but not Canada; that China is a foreign State but not Britain; that Afganistan is a foreign State but not South Africa. All these provisions the party in power has made in the exercise of our 'hard-won' national freedom! One wonders why.

5. Commonwealth Membership in the Context of Balfour Formula

A Commonwealth Conference, it may be recalled, had been arranged to consider the situation arising out of the Indian Constituent Assembly's resolve to constitute India into a Republic. It was held in London in April, 1949. The *communiqué* issued on behalf of the Conference, while referring to that resolve, stated that the Government of India had declared, and approved of, the country's desire "to continue her full membership

of the Commonwealth of Nations and her acceptance of the King as the symbol of the free association of its independent member-nations and as such the Head of the Commonwealth."

Now, the preamble to the Statute of Westminster, which reproduces in part the Balfour formula, also refers to the Crown as "the symbol of the free association of the members of the British Commonwealth of Nations". There are however, some points of difference. First, the Commonwealth Conference has substituted the King for the Crown a distinction without a difference except in a very technical sense. Second, there is no 'British' qualifying the 'Commonwealth of Nations'. Third, that members of the Commonwealth are "united by a common allegiance to the Crown" is not mentioned in the *communiqué*. For this phrase the expression the 'Head of the Commonwealth' has been substituted apparently at the instance of the Government of India. But the points of similarity cannot be ignored. The Statute of Westminster acknowledges that the Commonwealth is a 'free association', which implies that every member-State is free to secede from the Commonwealth. It admits the equality of status between the member-States in every aspect of their domestic and external affairs, destroying completely the idea of subordination one to another' ,

What, then is the real difference between the Indian Republic and a Dominion except, broadly speaking, that we have at the top an elected President, whereas a Dominion is presided over by a Governor-General appointed formally by the King but always on the advice of the Dominion Ministry ? Pandit Nehru has more than once stated that the Queen has no longer any functions in relation to India, and that she is only the symbolic Head of the Commonwealth, of which India is a member. I have already shown where the British monarch's functions have been eliminated impliedly, if not in express terms, by the provisions of our constitution; and in the Dominions, too, the area of the Royal prerogatives and powers is being rapidly reduced and, where they still exist, they are no

more than formal or nominal, the initiative for the exercise of those functions being taken by the Dominions themselves.

6. 'British' is no Forbidden *Mantram*

Much has been said in this country of the alleged deletion of the word 'British' as qualifying the Commonwealth of Nations, and it must be admitted that in the *communiqué* issued by the Commonwealth Conference of 1949 that word has not been used. What, in effect, does it matter if that much-used English word is or is not dropped from the familiar lexicon of a Commonwealth document? As a member-State of the Commonwealth the Indian Union is committed to the institution of the British monarchy, and to the law of succession governing that monarchy. The King or the Queen, as the case may be, must be a Protestant Christian and a defender of the Established Church, and we accept all this in spite of the republican form of our constitution. The dropping of the word 'British', even if it were a fact, makes no change in our position in the Commonwealth, or in that of any other member-State.

But the fact is that the word 'British' has neither been officially dropped nor officially acknowledged. Some persons in positions of great responsibility often use it, while equally eminent persons do not. We know that Prime Minister Nehru scrupulously avoids it as if by avoiding it the security and integrity of India's sovereign democratic republic were being effectively ensured. It is poor consolation for a man under whose leadership in 1929-30 India had taken the decision at Lahore that she would have no truck with Britain and her political system. I presume, however, that Pandit Nehru's attention has been drawn to Queen Elizabeth's Christmas broadcast on December 25, 1952, in which she said: "we belong, you and I, to a far larger family. We belong, all of us, to the British Commonwealth and Empire, that immense union of nations, with their homes set in all the four corners of the earth". The Queen is the symbol of the free association of member-

States of the Commonwealth. She is the Head of the Commonwealth. So, according to this the highest authority within the Commonwealth, 'British' is by no means a forbidden *mantram*. It is at large, if I may use that phrase, So that it is not yet a played-out song. In any case, there is no legal or political sanction for or against the use of the word 'British' in connection with the Commonwealth.

Reference is made in the preamble, as has already been shown, to the Indian Union as a 'sovereign democratic Republic'. What does the word 'sovereign' mean in the context of our constitution ? What does 'sovereignty' stand for in theory and in practice ? The Constitution of 1937 describes Ireland as a "sovereign, independent, democratic State". That constitution, it may be noted, did not sever Ireland's connection with the British Crown; it did not amount to secession from the Commonwealth. And yet its framers persuaded themselves that Ireland was a 'sovereign and independent' State. It follows that at least, in the Irish view, a Commonwealth State with the British Crown continuing to play its role in its external affairs on the advice of its Government, as was the position under the Executive Authority (External Relations) Act, 1936 (section 3), was entitled to claim not only sovereignty but independence. So words are sometimes used not only to convey but to hide meanings of things or of phenomena.

7. The Difference Between 'Independent' and 'Sovereign'

The Indian Constitution has dropped the word 'independent', which was inserted in the draft, and has retained the word 'sovereign' to describe precisely the status and position of our Republic. The draftsmen obviously felt that there was absolutely no difference between the two words, that the insertion of 'sovereign' was fully in accord with India's status as an independent country, and that the addition of the word 'independent' would be surplusage. If the Irish example of 1937 is our guide, then to become 'sovereign' and 'independent' a Commonwealth State need not sever connection with the

British Crown and the Commonwealth. There, however, they were wrong, and they have since corrected themselves by enacting the Republic of Ireland Act, 1948, whereby the British monarch has been completely eliminated (sections 1-3). It has been followed by a British statute entitled the Ireland Act, 1949, by or under which it is recognised and declared that the part of Ireland heretofore known as Eire has ceased to be part of Her Majesty's dominions (section 1). But it is clear that the Irish draftsmen, unlike the Indian law-makers, did not treat 'sovereign' and 'independent' as synonymous expressions. For that reason they used both the expressions while describing their State.

Besides, the jurists are not agreed, contrary to the view taken by the draftsmen of the Indian Constitution, that 'sovereign' and 'independent' have the same meaning in law. A State is sovereign when, as Cooley puts it, there resides within itself a supreme and absolute power, acknowledging no superior. Sovereignty is a municipal concept, whereas independence is an international concept. A State is sovereign in relation to its people, whereas it is independent *vis à vis* a foreign State or States. In relations between States sovereignty may, in a way, signify independence. It means the right on the part of an organised political community within given territory to exercise, to the exclusion of any other State, the functions of a State. From this point of view the framers of the Indian Constitution should have preferred the term 'independent' to the term 'sovereign', if they really meant that India was an independent country in terms of that constitution. The jurists apart, the lay public understand the expression 'independent' more than they understand the expression 'sovereign'. If these two expressions, as the draftsmen argued, yield the same meaning, one fails to appreciate why they should have elected to choose 'sovereign' instead of 'independent' in describing, in the preamble, the country's status and position.

Independence implies two things. It implies, in the first place, the power to command all persons within the

territorial limits of a State to the exclusion of any other body or authority. It implies, in the second place, the power to determine its relations with other States, including the power to declare war and to conclude peace. Some writers call the first the internal sovereignty and the second the external sovereignty of a State. This, however, seems misleading. In political science, no less than in municipal law, as distinguished from international law and practice, sovereignty connotes a relation between a superior and an inferior ; between the ruler and the ruled; between the State and its 'inhabitants. It cannot imply the relations between independent States, for they are not subordinate, one to another, in any aspect of their internal or external affairs. Therefore, the use of the word 'sovereign' in the preamble with reference to our country is descriptive of its supreme internal power vis a vis its inhabitants, but appears to have no application as such to its relations with other states.

8. Various Methods of Control over National Sovereignty or Independence

Leaving aside the purely juridical aspect of the matter, whether our country is or is not independent in relation to other States must be tested by the specific provisions of the constitution, and by the arrangements made or concluded from time to time between it and any of those States. I refer to international arrangements because, as history shows, these arrangements may nullify the constitutional provisions in substance, if not in form. There may, of course, be formal acknowledgment of the principle of equality of States, but the arrangements, agreements or compacts do, in fact, produce consequences, in modern times largely through economic manipulation, as well as by other means, which limit the sovereignty of the weaker States and reduce their independence to empty sound.

Some apparently independent countries are subjected to foreign military aggression. Some are compelled to join in aggression against others. Some are occupied by foreign troops and forced to supply military bases. Some agree or are made to agree to receive foreign military aid on the plea

of defence against foreign aggression, real or imaginary. Some are persuaded to agree to, or acquiesce in, foreign control of their internal affairs, and of their economic, industrial and financial policies. Some, again, are placed under trade embargo in order to compel them to yield to foreign interests. All these devices are adopted without, of course, disturbing the formal sovereignty or independence of the recipient or victim States. Sometimes the indigenous servitors of those foreign interests sellout national freedom or help preserve and maintain national slavery. The sovereignty or independence of such States, where the constitutions do not conform to reality and where the colonial or semi-colonial economy still persists in some form or other, is of formal significance only.

9. Implications of Military Aid to Pakistan

Take Pakistan. It is an 'independent' Dominion and possesses full and complete legal sovereignty. In its relations with other States and as a full-fledged member of the UN its independence is formally admitted. But it is , extremely doubtful if, in its present economic position, it can follow an independent policy in the exercise of its internal sovereignty or in its relations with big States. Reference may be made here to the US decision to extend military aid to Pakistan formally announced by President Eisenhower on the 25th February, 1954. The Government of Pakistan, it is stated, asked the US Government for a grant of military assistance, and the 'latter have been pleased to comply with the request under what is widely known as the Mutual Defence Assistance Programme. In the course of a statement issued from Karachi on the same date Prime Minister Mohammed Ali said that apart from undertaking not to engage in any act of aggression against any nation, which is obligatory in terms of the US Mutual Defence Assistance Act, "Pakistan has accepted no other obligation in return for this aid." He added: "The United States has not asked for any bases or any other undertakings or concessions at any time. Nor has Pakistan offered any".

There is, of course, no positive evidence that the legal sovereignty of Pakistan is being affected in a formal way by this aid. But President Eisenhower's statement and his letter to Prime Minister Nehru hardly leave the issue in doubt. He says: "This Government has been gravely concerned over the weakness of the defensive capabilities in the Middle East. It was with the purpose of helping to increase the defence potential in this area that Congress in its last session appropriated funds to be used to assist those nations in the area which desired such assistance, which would pledge their willingness to promote international peace and security within the framework of the United Nations, and which would take effective collective measures to prevent and remove threats to peace". The stated purposes and requirements of the mutual security legislation, as has been made clear by President Eisenhower, "include specifically the provision that equipment, materials or services provided will be used solely to maintain the recipient country's internal security and for its legitimate self-defence, or to permit it to participate in the defence of the area of which it is a part."

In this letter to Prime Minister Nehru Mr. Eisenhower writes: "Having studied long and carefully the problem of opposing possible aggression in the Middle East I believe that consultation between Pakistan and Turkey about security problems will serve the interests not only of Pakistan and Turkey, but also of the whole free world. Improvement in Pakistan's defensive capabilities will also serve those interests and it is for this reason that our aid will be given". Then the President reminds Prime Minister Nehru of the economic or financial assistance extended to the latter's Government by the US Administration and of his decision in favour of a continuation of substantial economic and technical aid to India, thereby hinting, if in mild terms, that both the Indian and Pakistani birds are of the same feather. Should the circumstances require military aid in addition to the economic and technical aid, Prime Minister Nehru is assured that the President would

give the Government of India's request in that behalf his most sympathetic consideration.

The stated purposes of the US aid, it is clear, are (1) the promotion of internal security, (2) the maintenance of legitimate self-defence and (3) the recipient country's full participation in the defence of the area or region of which it is a part. It means that the recipient country must satisfy the US Government that it has undertaken to maintain law and order adequately and effectively, to organise its defence efficiently and to make its contribution in a full measure, by participation in war or otherwise, to the defence of any other State or States which may come within a given regional grouping. And all this is designed, one is solemnly assured, to strengthen peace and security, to assure survival and progress and to deal with aggression or threats of aggression. To be brief, it constitutes the most effective means to save the 'free world' ! Now, if it is not a threat to countries that, in the opinion of the US Administration, belong to a different world, one does not precisely see what it is. If it is not an attack on the internal sovereignty or independence of the recipient State, the words 'sovereignty' and 'independence' will soon gather new meanings to suit the taste and convenience of the so-called leader of the 'free world'.

10. US Economic and Technical Aid to India

Nor is the economic or technical aid, which India has already received or may receive in future, entirely free from those sinister implications of the kind or type of military aid offered to Pakistan by the US Government. I may cite one or two instances in support of my contention. Attention is invited to the Indo-US Technical Cooperation Agreement concluded on the 5th January, 1952. The signatories were Mr. Chester Bowles for the US Government and Pandit Nehru for the Government of India. It follows the broad pattern of collaboration set in the General Agreement for Technical Cooperation signed on December 28, 1950, on behalf of the two Governments. It contemplates a fund known as Fund A, in which the US

Government will deposit a sum of 50 million dollars for the *agreed* objects. The sum shall be jointly administered by a duly appointed officer of the Government of India and the US Director. The Government of India have an established Special Development Fund known as Fund B, which exceeds 25 crores of rupees. They agree that for each agreed project, they will themselves or, in cooperation with the Governments of the States, make available supplementary finance, in rupees, in agreed proportions, as required, by authorising expenditures against Fund B or otherwise (article II).

The Government of India agree to constitute a Central Committee which shall be responsible for developing programmes of economic development and technical cooperation in which the assistance of the US Government can be most advantageously utilised. The US Director shall be a consultant to the Central Committee, and he shall be consulted with respect to all programme recommendations of the Committee, and his concurrence shall be required with respect to any recommendations involving the allocation or expenditure of funds made available by the US Government (article IV).

The two Governments will establish procedures whereby the Government of India will deposit, segregate or assure title to all funds allocated to or, derived from, any programme of assistance undertaken by the US Government. Such funds shall not be subject to attachment, seizure, or other legal processes by any person, firm, agency, corporation, or organisation or Government when, in the opinion of the US Government, any such legal process would interfere with attainment of the objectives of such programme of assistance (article VIII). The obligations of the US Government in this regard shall be performed by it through the Technical Cooperation Administration, an agency of that Government. The Director is the immediate representative in India of the Administration. The Government of India agree that the Administration, wholly directed and controlled by the US Government, the Director and his staff will share fully in all the

privileges and immunities, including immunity from suit in the courts of India, which are enjoyed by the US Government (article I).

No comment on the agreement is necessary; its terms and conditions speak for themselves. If these are not political strings, one does not simply know what they are. In addition, American capital is utilising, on a large scale, the familiar technique and procedure of British capital, as, for example, the formation of mixed companies with the participation of Indian capital. The American firm "Brainard International Co." has signed an agreement with the Government of India for the formation of a mixed company for the construction of a ferro-manganese factory in Orissa. It is stipulated that 80 per cent of the output of the factory must be exported to the US. Again, certain American petroleum companies have obtained concessions for the exploration and refining of oil in India. The granting of loans from the Bank of International Development and Reconstruction for food imports and other purposes is another method of keeping the Government of India in their proper place.

Apart from the control of British capital over the key positions in Indian economy, the sterling to which this country is tied down plays an important role in the determination of its financial and economic policy. It provides an opportunity for the City of London to control its trade and exchange mechanism. Thus the internal sovereignty of the Indian Union is not free from the acquisitive penetration of the greedy American dollar or the seductive overtures of the sanctimonious English sterling.

11. Different Aspects of Sovereignty

It would not be out of place here to refer to certain aspects of 'sovereignty' stressed by some writers. A distinction is often made between the sovereignty which *in fact*, though not *in law*, is the supreme power and the sovereignty which *in law*, though not *in fact*, is the supreme power, within a given territory. One is called *de facto*

sovereignty while the other is known as *de jure* sovereignty. When there is no conflict between the source of actual power and the legal basis of that source a State is said to possess both *de facto* and *de jure* sovereignty.

But the question remains: why does this conflict arise ? What is it due to? The orthodox school, which is not free from its environmental and ideological inhibitions, thinks that *de facto* sovereignty rests upon physical power or upon religious influence rather than upon legal right. What is a legal right but a right sanctioned by law? What is law but the manifest will of the dominant class in society? And what is the source of authority of the dominant class but physical power, religious influence and its own mechanism of coercion?

What legal right, one may ask, had the East India Company when they took possession of Indian territories except the right of conquest, colonisation by cession, settlement by agreement, and what not ? What right had Queen Victoria when she assumed direct rule and exercised the sovereignty of the British State over India except the right as sanctioned by Her Own Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons (all British), and by the authority of the same ? What legal right had the American colonists to constitute themselves into a confederation in 1776, later on transformed into the United States, except the right of rebellion against the British State, and of settlement in disregard of the wishes and interests of the coloured indigenous population scattered over the colonies ? The British State in India, according to the accepted theory, had both *de facto* and *de jure* authority. It was, as they put it, a State established by law. So does the United States possess *de facto* as well as *de jure* sovereignty over its territories and outlying possessions.

There are, it is true, historical instances of actual sovereignties which failed for some reason or other to win the confidence of the people or international recognition and just broke down as suddenly as they had taken control of

affairs. A comparatively modern instance is afforded by Bachha Sako in Afganistan, who fell after a few weeks' occupation of the Amir's throne. There are, again, instances of actual sovereignties which are ultimately accorded international recognition either because the people stand behind them or because it is necessary, in the interest of some powerful States, to give them recognition whether or not they had popular support.

This brings us to the question of international recognition. Such recognition is granted (1) by declaration, or (2) by treaty. Sometimes it is withheld, and the *de facto* sovereign authority is not acceptable by reason of its class character, as in the case of the Soviet State which had been established after the October-November Revolution of 1917, and which had to fight for recognition for several years. Sometimes recognition continues despite the sovereign authority's overthrow by its own people, and it is kept alive by military aid, financial assistance and other kinds of patronage because it serves as a pliant tool for certain big powers, as in the case of Chiang Kai Sheik and his discredited and disorganised Kuomintang, who have been driven out of the mainland of China.

The Government of New China led by Mao Tse Tung, who enjoys in a full measure the confidence of the Chinese people, are in a peculiar position internationally. Some States, including India have given them recognition, while others led by the US have deliberately withheld it. As a result, one is confronted with the amazing spectacle of China, one of the five permanent members of the United Nations, being represented in that organisation and in its affiliated bodies by an opportunist and unscrupulous clique, who have no claims to international recognition other than the patronage of Washington and its satellite States. The action of the US Government in this regard demonstrates, perhaps more convincingly than any other event, how in view of the American ruling circles the world is to be saved for democracy and for the American way of life. The procedure of giving or withholding recognition is utilised by certain big and powerful States for interposing

their will in the internal affairs of smaller and weaker States and influencing the conduct of their international relations. Thus the internal sovereignty of the latter and their independence in relation to other States are controlled and regulated in a subtle, indirect and yet so effective manner that the class interests of big and powerful States may be fostered and promoted.

12. Principles Underlying Recognition of States

Whether a *de facto* sovereignty is also a *de jure* sovereignty depends on several factors. of these the most familiar, in the context of history, seems its acceptability to the big and powerful States. Where there is conflict between these States the *de jure* sovereignty of even an established and popularly sanctioned State is in a state of flux. The case of New China is an instance in point. There are other well-known historical examples. Israel was recognised as a State by the US Government in 1948, even when the fight between Arabs and Jews continued upon the withdrawal of the British armed forces. Was the US recognition granted on the basis of a factual situation, or because the dollar dictatorship wanted to investigate the mysteries of the oilpipe in the Middle East ? Recall the circumstances in which the Franco regime was established and recognised in 1939 before the outbreak of the Second World War. A Popular Front Government was in power. It was scattered by General Franco with the aid and support of Nazi and Fascist forces. What considerations, one may ask, weighed with the then big powers, including the US, in recognising the Government set up by Franco by violence against the Spanish people, and in conspiracy with the German Nazis and Italian Fascists ? There are, it is clear, no hard and fast rules governing international recognition of a State notwithstanding that statesmen talk glibly of high-sounding principles and of moral categories. The main determining factor is perhaps the class character of the State concerned. Of Course, even big powers sometimes may be forced, by compulsion of events, to disregard that factor.

Now, the public generally and students in particular are puzzled, and confused by a bewildering variety of speculative theories about sovereignty. Many of these theories do not conform to reality and are essays in abstruse metaphysical abstraction. For instance, one hears of the permanence, exclusiveness, unity and all-comprehensiveness as being the transcendental qualities of sovereignty. One is told, in authoritative accents, of titular sovereignty, legal sovereignty, political sovereignty, popular sovereignty and of sovereignty without beginning and end. In Support of one theory or another distinguished names are cited, and the result is that nobody is wiser by these speculations.

13. Development of the Concept of Sovereignty

When towards the close of the Middle Ages in Europe the forces of production sought opportunities for the full utilisation of their creative energy against the restrictions of the then existing social relations, a conflict arose between the secular claims of society and the spiritual pretensions of the church. A theory was developed then to advance the cause of the politically organised laity against the privileges of the clergy. That theory came to be known as Sovereignty of The State. The concept of sovereignty developed in the wake of European renaissance. "Sovereignty", observed Bodin in 1576, "is supreme power over citizens and subjects, unrestrained by the laws". He did not repudiate 'the divine law' and the 'law of nature', but subject to these laws, a 'sovereign' in every community was competent to make laws in the exercise of his discretion.

That doctrine was developed by Hobbes and Bentham, and on their teachings were largely based the views of Austin as expressed in his "Lectures on Jurisprudence", published in 1832. "If a determinate superior", said Austin, "not in a habit of obedience to a like superior receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." In the exercise of his unchallengeable power the sovereign makes law, which is a

"command given by a superior to an inferior." The sovereign may be an individual person or a body of persons, as, for example, a hereditary monarch, a chosen chief or an elected council or committee.

Whatever its shortcomings, the Austinian theory is at least free from the familiar, hackneyed idealistic chatter. The sovereign, according to him, is not the general will, the reality of reason, the will of God, the vague and unascertainable public opinion, the people in the mass or even the electorate. It must be some 'determinate' person or authority, to whose will the bulk of the people render political obedience and who is not himself subject to any legal restraints. Austin's theory, it may be noted, lays stress on the legal aspects of sovereignty, on what is popularly known as the legal sovereignty, and does not take into consideration the social forces and the ideological superstructure built to sustain those social forces, which set up the legal sovereignty and maintain and uphold it.

In our country, so far as the Centre is concerned, the President and the two Houses of Parliament constitute the legal sovereignty in regard to matters assigned to them by or under the constitution. In a clearly defined area the President has power to legislate by orders, ordinances and proclamations. If any legislation enacted duly and in appropriate form by any of these competent authorities does not exceed the powers conferred upon them, the courts would consider it good and valid law. The same principle applies to legislation enacted by the Governor or Rajpramukh, and by the appropriate State Legislature. No opinion expressed, or no decision taken, by the bulk of the people or of the electorate would be recognised or accepted as law by the courts. The sovereignty, as conceived by Austin, is the supreme power of the designated authorities authorised to make laws or issue commands, and to invest them with sanction. It ignores the social relations which constitute the basis of the State, its class character and ideological background and the various contrivances, democratic or other, devised to bring the legal sovereignty into being and give it authority and power.

The electorate, that is, have the right to vote and choose their representatives, and there their right ends unless, of course, they are in a position to exercise the supreme power by initiative or on the basis of referendum. The public other than the electorate may bark and shout and even howl, but the caravan passes on. In Austin's view neither the electorate, who are supposed to constitute the political sovereignty, nor the public, in whom the popular sovereignty is believed to be vested, can be indentified with that 'determinate superior,' who or which is the sovereign power of a 'political and independent society'. Austin's theory lacks adequacy in so far as it lays stress on the form rather than on the content of the sovereignty. Then there is another point, and it is that Austin's theory does not give weight to those primitive social institutions which managed, controlled and regulated affairs without the elaborate paraphernalia of the familiar instruments of modern States, or to the customs and traditions which acquired the force of law among different politically organised communities.

14. The Sovereignty Vested in the Dominant Class

It must be admitted, however, that in the matter of the management of internal affairs and of the conduct of external relations the supreme power of a given State embracing respectively its sovereignty and independence is known through its designated authorities. What counts normally is not who, in fact, dominates the State but who, in law, formulates its policy and gives it form and shape. Wall Street may, in fact, dominate the United States, or the City of London, for all practical purposes, may be the policy-maker of Britain, but Washington and Westminster are known and recognised as speaking authoritatively for the United States and Britain respectively. From this point of view no exception may be taken to the Austinian theory of sovereignty.

The political sovereignty, as distinguished from the legal sovereignty, may formally vest in the electorate but, in essence, the sovereignty of the class that, in fact, dominates

the State or, more precisely, constitutes the State. In the USSR for instance, the political sovereignty belongs to the peasants and workers because they constitute the State and, in fact, formulate policy. And that sovereignty is not only political but popular as well. In Britain and in the US, on the contrary, the political sovereignty, despite the electoral machinery and its form, belongs, in ultimate analysis, to the capitalist class who constitute the State and formulate policy in disregard of the needs and requirements of the electorate and of the bulk of the population, or by recourse to bluff and bluster. And that sovereignty is, by no test or standard, a popular sovereignty, although attempts are persistently made to create illusions among the populace by the propagation of abstruse metaphysical, social and political doctrines.

The theoretical chatter about popular sovereignty in States, where the source of power is in the hands of the possessing and acquisitive class on account of their ownership and control of the instruments and means of production, has no relation whatsoever to reality. Popular sovereignty, in such context, may be understood only in the perspective of potential popular revolt against the dominant class that constitutes the State and, therefore, against the State itself. For, the dominant class and the State are completely identified, even though a certain formal distinction is maintained between them partly for the sake of operational convenience but mainly as a political and ideological smoke-screen.

15. Theory of Sovereignty Used to Promote Class Ends

Doubts arose even in the mind of Dicey as to the seat of sovereignty in Britain. He spoke repeatedly of the sovereignty of Parliament, but then he was confronted with certain obvious limitations to which that sovereignty was subject. The limitations are due to lack of continuity and of relative permanence of the House of Commons; to the possibility of violent public disapproval of the laws that may be enacted by Parliament; to the fear of loss of confidence of the electorate; and to similar other factors.

Consequently he drew a distinction between legal sovereignty and political sovereignty. Legal sovereignty he defined as "a merely legal conception," which means 'simply the power of law-making unrestricted by any legal limit'. He stated that "that body is politically sovereign or supreme in a State the will of which is ultimately obeyed by the citizens of the State." Thus, according to Dicey, Parliament is the legal sovereign, whereas the electorate is the political sovereign. It is, therefore, clear that in the Austinian sense Dicey's legal sovereignty is not sovereignty at all, because it is not supreme power. It is merely an expression of relations between Parliament and the courts, an aspect of sovereignty which has already been dealt with. As regards political sovereignty, it is not the will of the electorate that the citizens obey or are forced to obey except in a formal way. It is the will of the owners and managers of the instruments and means of production that is reflected, in ultimate analysis, in the laws, ordinances and orders.

The concept of sovereignty was used in the sixteenth and seventeenth centuries to bolster up the divine right of kings against the privileges of the church as well as against the claims of the people. Ideas were invented and propagated to invest the coercive power of the sovereign with extra-material sanctity. Sovereignty, said Bodin, is illimitable, indivisible and perpetual, being handed down from one ruling monarch to his successor. Hobbes called it unanimous so that there was no room for dissentors within the limits of its jurisdiction. The monarchical absolutism, which these theories sustained and upheld, was challenged and overthrown in Britain in 1688, in the American colonies in 1776, and in France in 1789.

As a result of these uprisings, the doctrine of sovereignty as such did not, however, undergo any material transformation from the popular point of view. The monarchical supremacy, supported as it was by the feudal order, only yielded place to the supremacy of the bourgeoisie. From one class the sovereignty passed to another class. But the ideological exponents of the new

sovereign class, ignoring the reality, propounded the theory that the supreme power now belonged, in Britain, to Parliament and the people; and in the United States, to the people and the federal constitution. The supreme power, in fact, is exercised nevertheless by the class which controls Parliament, and is in a position, by its command of superior material resources, to exploit the electoral machinery in such a manner that the *status quo* is not substantially disturbed by any constitutional means.

Every federal constitution is written and, to a large extent, rigid, but whether it should or should not be altered depends not on the inherent strength of the constitution but on the pleasure of the dominant class. If any given federal structure is found to be resistant to change for a long period of time, the reason is to be sought not in its power of resistance but in the source of that power. Conversely, if changes are frequently made, the reason is that without such changes the dominant class finds it extremely difficult to pursue its objectives. *Mutatis mutandis* the same considerations apply to unitary constitutions, to the composition and structure of Parliaments and to the nature and character of Governments. Nor is the doctrine of the sovereignty of the people, in any sense, tenable in conditions where the coercive apparatus of the community is under the operational control of the privileged class.

Some commentators deduce from the opening recital in the preamble to our constitution the theory that the ultimate political sovereignty of the Indian Republic lies with the people. It is the people themselves, it is asserted, Who give it the authority and sanction. In this respect our constitution-makers have mechanically reproduced words used in the preamble to the American Federal Constitution of 1787 and in the preamble to the Irish Constitution of 1937. "We, the people..." occurs in each of these solemn documents. Do recitals of this kind mean anything ? They do not, unless to revolt against the Government is recognised as a legal right of the people. In none of these constitutions power to overthrow the Government by rebellion is

acknowledged as a legal right. Nor, it must be admitted, is the position different in any other part of the world. What does it prove? It proves that the expression "We, the people...", wherever employed, does not mean the people but a certain class or a combination of classes who, in the name of the people and on the pretext of promoting their welfare, contrive a mechanism of class dictatorship which they call democracy.

16. A British Act Set up Indian Constituent Assembly

Take our own Constituent Assembly. It was not set up by the people. It was created and sanctioned by the British authorities. Its sovereignty, whatever it was, was derived not from the people but from a British statute. Members of the Constituent Assembly were elected not by the people but by persons who had themselves been chosen on a franchise restricted, again under a British statute, to not more than 18 per cent of the population. And yet knowing all this, they have solemnly proclaimed that they are the people of India, and as such they have given to themselves the constitution.

It is true that certain formal democratic principles have been incorporated in our constitution, but surely a Constituent Assembly set up by the British and under a British law could not claim that it was the people of India. It is not surprising, however, that a false recital should have been inserted in the preamble because it is the usual practice with the ruling classes generally, or with those classes who manoeuvre for power. Conformably to the normal pattern of bourgeois social organisation our Constituent Assembly, while assuring the dignity of the individual and resolving, in solemn terms, to secure justice, liberty, equality and fraternity, stands pledged to consolidate what it calls the unity of the nation. These expressions in the recital, though obviously inconsistent, one with the other, should not cause any surprise either, for the deification of the 'nation' and the 'nation-State' is about the most effective means of causing confusion or of lulling the ordinary folk into a false sense of security, freedom and glory. If you cannot, as, you

will not, give them food and shelter and offer them honourable means of livelihood, feed them on superstitions, metaphysical abstractions and the invisible bounties of Providence.

So, side by side with popular sovereignty, with political sovereignty and with legal sovereignty, we hear of the sovereignty of the 'nation-State.' Like the State this sovereignty, we are asked to believe, is indestructible, invariable and permanent. I have shown that there is no substance in the theory that the State is permanent, that it has no beginning or end, that it is merely an abstract idea and has no concrete reality. I contend, on the basis of facts and events of history, that such theories about the sovereignty are baseless. If the State rises and falls, so does sovereignty. If the State is a concrete reality, so is sovereignty. If the State passes hands from one class to another, so does sovereignty. The theory of the indestructibility or exclusiveness of the nation-State, of national sovereignty is potentially dangerous in that it may lead to tyranny and oppression within and may sow seeds of conflict without.

17. Sovereignty Divisible in Theory and Practice

As to the doctrine of the indivisibility of sovereignty, it may be looked at from different angles. No serious controversy arises in respect of a unitary State. The sovereignty belongs to, and is exercised by, a centralised all-comprehensive machinery. It makes laws to the exclusion of any other authority and enforces obedience thereto. In the external aspect of sovereignty, which I call independence, it declares war, concludes peace and makes treaties with foreign States. One is, however, confronted with difficulties while dealing with a federal State. Wherein does the sovereignty of a federal State reside? In its relations with foreign States, of course, the supreme power is exercised by the central authority of an independent federal State. And from this point of view, the constituent units do not come into the picture, except in certain cases for the purposes of international representation, as in the case

of the Union Republics of the USSR, under article 60 of the constitution.

Each Union Republic of the USSR has the right, under article 18-A, to enter into direct relations with foreign States, conclude agreements with them and exchange diplomatic and consular representatives. This is, however, subject to article 14 (a), whereby the jurisdiction of the USSR covers representation of the Union in international relations, conclusion and ratification of treaties with other States, establishment of a uniform system in the relations between the Union Republics and foreign States. It means that the Union Republics are entitled to deal with foreign States but that the USSR has power to ensure that a uniform system in the relations between these Republics and foreign States is established so that the territorial integrity of the USSR or of any of the Union Republics is not imperilled. This is a power which was given to the Union Republics for the first time in 1944 in the midst of the Second World War by amendment of the constitution. This power does not include the right to deal with the questions of war and peace in respect of a foreign State, and that right belongs only to the USSR under article 14 (b).

It should be noted that the sovereignty of the Union Republics is limited, under article 15, by the provisions of article 14. The USSR is founded on the principle of the divisibility of sovereignty. It is divided between the Union and the Union Republics within limits set by the constitution. In the US the Supreme Court has held in the case of *United States v. Curtiss-Wright Export Corporation* (299 US 304) that (I) the States had no authority in the field of foreign affairs; (II) that when independence had been achieved and British sovereignty liquidated the right in respect of foreign affairs passed to the Union; and (III) that this right of the Union did not depend on the affirmative grants of the constitution but was implied in the instrument itself. "The powers to declare and wage war", observed the Court, "to conclude peace, to make treaties, to maintain diplomatic

relations with other sovereignties, if they had never been mentioned in the constitution, would have been vested in the federal Government as necessary concomitants of nationality.

The power of the US Congress in this regard is not, however, to be presumed merely from the implication. Article 1, Section 8 (II) of the constitution gives the Congress power to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water. This is supplemented by the prohibition imposed on the States. Section 10 (1) of that article says that no State shall enter into any treaty, alliance, confederation, and grant letters of marque and reprisal. It is further laid down by sub-section (3) that no State shall, without the consent of the Congress, enter into agreement with a foreign State, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. One would not be wrong in concluding that so far as foreign relations, including questing of war and peace are concerned, the supreme power of the State is, as a rule, exercised by the federal centre, whether it is called sovereignty or independence. There is no question of divided sovereignty or bifurcated independence in this field.

In the sphere of internal affairs, however, the issue is not so simple and obvious. The US Supreme Court has ruled in the case of *Chis olm v. Georgia* (2 Dallas 435) that the sovereignty is divided between the federal centre and the constituent units inasmuch as there is distribution of power so that one cannot interfere with the other in their respective' spheres. Each is sovereign in respect of subjects assigned to it by the constitutional grant. Where any conflict of jurisdiction arises recourse is had to judicial adjudication, for which provision is made in all federal constitutions. The authority or competence of the courts may vary from federation to federation, but, roughly speaking, the right to interpret the grant belongs uniformly to the courts, except perhaps in the USSR where, under article 49, the Presidium of the Supreme

Soviet, and not the Supreme Court, interprets the laws in operation.

Opinion as to the divisibility or otherwise of the sovereignty of a State is divided among political thinkers. They may be classified into four schools. The first school represented by de Tocqueville and Weitz, who are of the view that the sovereignty is divided between the federal centre and the units. The second school led by Calhoun and Seidel believe that the sovereignty is indivisible, that the union was created by the units, that the units possess the sovereignty and that the units temporarily hand it over to the central authority. That is all. The exponents of the third school, for instance, Laband and Jellinek, think that that sovereignty of a federal State belongs only to the centre, that the units are States without sovereignty and that as a symbol of authority they exercise legislative and administrative powers within limits prescribed by the constitution. There are still others —and they speak for the fourth school—who, like Dicey, believe that the sovereignty of a federal State is vested not in the centre, not in the units, and not even in the centre and the units by a scheme of distribution, but in the constitution itself.

But all these four schools concentrate on the formal, juridical relations between the centre and the constituent units. They ignore completely (1) the social forces that lead to the formation of federations ; (2) the ever-changing conditions of capitalist development and capitalist crisis that cause increasing concentration of power, despite constitutional provisions, as an expression of the interests of big business; and (3) the inner contradictions of capitalism that impel the bourgeoisie to fight among themselves with the result that while some insist on the maintenance of what Dicey called State rights others take their stand on national unity.

18. The Trend Towards Centralisation and its Causes

Why is the federal power stronger today in the US than it was when the constitution was framed in 1787? It is not much too difficult to find the answer. Upto the

end of the eighteenth century the bourgeoisie in the American States had not acquired national character and importance. They were scattered over the country with, of course, stronger foundations in some States than in others. Each section of the bourgeoisie wanted special rights and privileges in its own area to the exclusion, if possible, of its rival sections. There was, besides, no uniform development of capitalism in all the States. In some States agriculture was more important than personalty interests and *vice versa*. What was conducive to the capitalist interests constituted, in many instances, a hindrance to the promotion of the interests of the farmers. Again, the conditions of monopoly capital which require a national, if not international, base did not exist at that time and for many years afterwards.

Yet after having achieved independence by successful rebellion the States felt the necessity for pooling their resources together for certain common purposes. Thus as a compromise they devised a scheme which, while setting up a national authority with specific powers, left the units ample freedom in the residuary field for the purposes of regional development. But the compromise did not and could not resolve all conflicts. The smaller States were afraid of the greater resources of the larger States, and both were suspicious of the national power.

The assumption of State debts by the centre, contrary to the views expressed by Jefferson and his followers, placed it in a position of control over the States. The starting of national banks, and big business financed by them seriously weakened State banks and local business and, in certain instances, put them out of action. It was a case of dog eating dog, of the big and more resourceful capitalist ousting his weaker rival.

This continuous conflict between urban capital and rural husbandry, between big capital and small capital, between creditor and debtor, with success for the stronger party in each case, was reflected in the decisions of the Supreme Court who, by the construction of the implied powers clause, shifted the balance in favour of the federal centre. And

behind the screen the organised national bourgeoisie controlled the federal centre. The culminating point was reached in the Civil War of 1867 under the national leadership of Abraham Lincoln who stood for an "indestructible Union". His success against the 'rebel' States of the South consolidated the Union and strengthened federal centralisation. Apart from the question of slavery, the issue involved was one of conflict between organised national capital and the scattered farming interests. The issue was economic at the base, and the ideological and juridical superstructure built to sustain it was no more than a smoke-screen.

19. A Swing in the Pendulum due to Partition of India.

In the context of today all the world over the conflict incidentally is one not merely between big capital and small business within national frontiers but between big capital of one country and its foreign counterpart in the international field. One would do well to ponder the causes responsible for the partition of India, the shifting of emphasis on the central power as against the State rights in the Indian Constitution and the conflict between Karachi and the Pakistani Provinces, particularly East Bengal on language and other issues.

When the British imperialists found, in the course of the war, that in consequence of the irreparable damage done to British capital at home and abroad they would not be in a position to exploit the resources of undivided India in the manner and to the extent they had done in the past they decided in favour of partition. That decision they took not to reward the Muslim League and to spite the Congress, but solely and purely in their own interest. They persuaded themselves that under a scheme of political division they would have opportunities of exploitation by reason of both the Muslim belt and the non-Muslim belt being rendered weaker for partition.

On the Muslim side, apart from the fear that the overwhelming Hindu majority in undivided India would, suppress their culture and tradition, there was the

feeling entertained by a section of the new Muslim bourgeoisie that in Pakistan they would be able, without challenge from their non-Muslim rivals, to exploit, in an atmosphere of religious fanaticism, the resources in men and material. On the Hindu side, the conscious and organised leadership knew that their talk of national unity and national culture had no relation to reality. While, however, persisting in that talk they realised that with the Muslim bourgeoisie ousted from India they would be free to mobilise themselves in their own way to tap the resources not only of their part of what was formerly British India but of the vast majority of the undeveloped States which had no alternative but to accede to India. These differing but contradictory motives, paradoxically enough, produced a peculiar unity of purpose, and the result was a hasty and ill-conceived triangular compromise in the form of partition of India.

Before partition, one must have noticed, the Congress had uniformly stood for defined powers for the centre in a federation, and the residuary for the units. In other words, they had repeatedly expressed their preference for the 1787 American model. But immediately after partition, they took an entirely different line, accepting the general scheme of distribution of power as adumbrated under the Government of India Act, 1935, allocating the residuary to the centre by eliminating, in the process, the ambiguous provisions of that Act, and otherwise strengthening the centre in legislative, administrative and financial matters.

20. Reasons for Change of Front

What, one may ask, was this change of front due to? First, Indian big business, concentrated in certain areas, had been organised on a national scale since the First World War. They strengthened and consolidated their position during the Second World War. Naturally, they wanted a national base for the conduct of their operations without any challenge from the States. Second, there was no uniform capitalist development in all the provinces, and in most of them the predominant economy was and still is

agriculture. There was and is no strong zonal or local business to challenge the supremacy of big business organised on a national scale. Even where, as in West Bengal, which is a very important industrial belt, capital is sufficiently organised, it is, in a large measure, in the hands of the British, who work in collaboration with Indian big business or operate under safeguards. Consequently, relatively small and unorganised zonal or local business could not make itself felt in the decisions of the Constituent Assembly, and the interests of the different zones and areas were either completely ignored, or were not given due weight. Third, without a strong centre big business could not successfully and effectively penetrate the acceding Indian States in quest of the surplus value. These are some of the considerations which seem to have weighed with the Constituent Assembly in rejecting the Congress policy advocated for years in the matter of allocation of power between the centre and the units.

One should not infer from what I have said so far that the location of the residual power in the centre has made all this change in the political scene. In modern times when there is an exhaustive enumeration of subjects, as in India, the exercise of the residuary power as such does not determine the pattern of Government. It has lost its old importance by the impact of events. But in judicial adjudication the residuary is taken into consideration along with the scheme of distribution of power and the limitations deliberately imposed on the exercise of power by the units.

Whether our constitution is essentially federal or not I propose to discuss later on. It is nevertheless pertinent to point out in this connection that by its emphasis on 'the unity of the nation', on the abstract conception of 'we, the people', and by its substantive provisions the constitution appears to have vested the sovereignty of India in the Union rather than distributed it between the Union and the States. It recognises no dual sovereignty, except to the extent that there is demarcation Of power between the centre and, the units supported by the principle that, unless otherwise disturbed, Part A and, to an extent, Part B States are, within

fixed limits, mistresses in their own defined spheres as the centre is the mistress in hers, but again within the limits of the constitution. But the centre has power to suspend this distribution of functions, and to take the initiative in voting itself into power and putting the States out of action. Of course, the question of sovereignty for Part C States and D territory for the present does not arise at all.

21. Doubt as to India's Independence

To sum up India is, without doubt, a sovereign State, yes, 'sovereign' in the sense in which that expression is formally understood and interpreted in law. The sovereignty of India belongs, for all practical purposes, to the centre, although the distribution of powers contains the vague insinuation of dual sovereignty. Assuming, as I do, that 'sovereign' and 'independent' are not synonymous terms, India is, again formally, an 'independent' country, except perhaps in the matter of war and peace where, so long as she elects to remain within the Commonwealth, it is doubtful if She can have free choice and act solely in her own right. She may maintain neutrality in a war in which the other Commonwealth countries are belligerents. She may also conclude treaties or agreements with foreign States.

But doubt exists as to whether it is permissible for India to engage in war or in hostile activities against a Commonwealth country either by direct participation, or by aid and assistance offered to the 'enemy' of the Commonwealth or any of its component parts. There is doubt, too, as to her competence to sign treaties or agreements whereby she may be committed to hostilities against a Commonwealth State. For complete freedom, she must enact that she is no part of the Queen's dominions and cut off her connection, symbolic or other, with the Queen. Even then she may not be independent unless certain social and economic changes are effected transforming, in the process, the relations of production and releasing the productive forces from the bondage of the economy of scarcity and of the surplus value. But the severance of connection with the Commonwealth may prove to be a decisive, if only the first, step.

CHAPTER IX

THE INDIAN REPUBLIC AS UNION OF STATES

1. From Nationalism to Religious Revivalism

India, that is Bharat, is a Union of States [article 1 (1)]. Why the two expressions 'India' and 'Bharat' have been used in the constitution with reference to the country has not been adequately or satisfactorily explained. Possibly 'Bharat' has been chosen to revive the past memory of this ancient land, of its crowded and eventful history, of its culture and tradition and philosophy, and to give the new political setting the old mythological touch and colour. It may as well be that the Constituent Assembly felt that this name was needed to distinguish the predominantly Hindu-majority belt of partitioned India from its predominantly Muslim-majority belt which had come to be known as Pakistan.

I consider it an unfortunate choice because, great as our past had been, we have passed through centuries of cultural and ideological assimilation and absorption so that, by a slow but steady process, we have become a mixed and composite people cherishing a sense of values to which no particular caste or community can lay special claim. Psychologically the name may be an irritant to communities other than the Hindus, although there are no manifest signs of disapproval or dissatisfaction at the present moment. There was no protest at the time when the Constituent Assembly was in session not because, as I suspect, there was no ground for protest but because the emotional reaction to partition among members of the majority community generated among the minorities, especially Indian Muslims, a sense of insecurity and fear.

Whatever the derivative or etymological meaning of Pakistan, to the unsophisticated folk it is no other than the Muslim land. The name 'Bharat' tends, on the other hand, to create the impression that it is the Hindu

counterpart of the Muslim land, that is, the land of the Hindus. It is significant that on the other side of the border a certain section of the press and some politicians frequently use it to impress upon the Pakistani masses that India is no better than a tyrannical Hindu oligarchy.

The retention of the name 'India' in the Indian Independence Act for this part of divided India facilitated agreement as to devolution of international rights and obligations. It was agreed, for example, that membership of all international organisations together with the rights and obligations attaching to such membership, would devolve solely upon the Dominion of India. The Dominion of Pakistan was required, under the agreement, to apply for membership of such international organisations as it chose to join [Schedule to the Indian Independence (Inter-national Arrangements) Order, 1947]. The nomenclature was not disturbed by the Constitution of 1950 except for the addition of 'Bharat', presumably to explain what India was and is. Any substantive change in the name 'India' would probably have made a change in the international position and status of the country, and called for fresh agreements as to rights and obligations or for revisions of agreements previously concluded. It was wise on the part of the Constituent Assembly, if I may say so with respect, to avoid this and similar complications by retaining the name 'India' in the body of the constitutional text.

2. Different Categories of States

The States of the Indian Union are (i) Part A States which were formerly British Indian (governor's) provinces; (ii) Part B States which are acceding Indian States of major importance such, for example, as Mysore, Hyderabad and Jammu & Kashmir, and Unions of States; and (iii) Part C States which are acceding Indian States of comparatively minor importance and pre-partition chief commissioners' provinces of Ajmer-Merwara, Coorg and Delhi.

Part A States are (1) Aridhra, (2) Assam, (3) Bihar, (4) Bombay, (5) Madhya Pradesh, (6) Madras, (7) Orissa, (8) Punjab, (9) Uttar Pradesh, and (10) West Bengal. Andhra has been created out of Madras. The territory of Assam comprises the territories which, immediately before the commencement of the constitution, were comprised in the province of Assam, the Khasi States and the Assam tribal areas, but does not include the territories specified in the Schedule to the Assam (Alteration of Boundaries) Act, 1951. The territory of each of the other Part A States comprises the territories which were comprised in the corresponding province and the territories which were being administered before the commencement of the constitution as if they formed part of that province. The name of each State remains the same as that of the corresponding province except for 'Madhya Bharat' which is substituted for the Central Provinces & Berar, 'Punjab' which replaces East Punjab and 'Uttar Pradesh' which stands for the United Provinces. The name 'West Bengal', which was adopted in consequence of partition, is not altered.

Part B States are (1) Hyderabad, (2) Jammu & Kashmir, (3) Madhya Bharat, (4) Mysore, (5) Patiala and East Punjab States Union (PEPSU), (6) Rajasthan, (7) Saurashtra, and (8) Travancore-Cochin. The territory of the State of Madhya Bharat includes the territory which, immediately before the commencement of the constitution, was comprised in the chief commissioner's province of Panth Piploda.

Part C States are (1) Ajmer, (2) Bhopal, (3) Bilaspur, (4) Coorg, (5) Delhi, (6) Himachal Pradesh, (7) Cutch, (8) Manipur, (9) Tripura, and (10) Vindhya Pradesh which has been cut out of Part B States and placed in the category of Part C States.

The territory of India comprises the territories of the above-mentioned three categories of States, and the territories of the Andaman & Nicobar Islands which are Part D territories. To the territory of India belong such other territories as may have since been acquired,

for instance, the territory of what was formerly French Chandernagore [article 1 (2) (3) and First Schedule] .It will be seen that Part D territories (the Andaman & Nicobar Islands) are not States for the purposes of the Union as described in article 1 (1), nor are so the territories which have since been acquired. These territories are part of the territories of the Indian Union, but do not constitute units of the Union and, in the spheres of legislation and administration, are accorded differential treatment. It is provided that these territories, whether included in the relevant , schedule or not, shall be administered by the President, acting to such extent as he thinks fit, through a chief commissioner or other authority appointed by him. The President may make regulations for the peace and good government of any such territory, and any regulation so made may repeal or amend any law made by Parliament or any existing law which is for the time being applicable to such territory. The regulations made by the President shall have the same force and effect as an Act of Parliament which applied to such territory (article 243).

No provision is made for their representation in the Council of States for the obvious reason that they are not States. Parliament may however, by law provide for their representation in the House of the People. It may be through nomination or direct or indirect election. Any such territory or territories may be transformed into States, or a new State may be formed by uniting any such territory or territories to a part of any State. For this, legislation by Parliament shall be necessary.

3. Demarcation of Territories from States in Historical Retrospect

This idea of demarcating the States from the territories, apart from its local background history, seems to have been borrowed, as in many other respects, from the American Constitution. That constitution lays down that the Congress shall have power "to dispose of and make all

needful rules and regulations respecting the territory or other property belonging to the United States" (article IV, section 3 (2)]. Some commentators infer from this constitutional provision that a territory, though belonging to the United States, does not become a part of the United States, until it is incorporated by formal Congressional declaration. This view seems to be taken on the basis of the ruling in the case of *Balzac v. People of Puerto Rico* (1922). Nonetheless it is misleading. The provision as to 'territory' did not contemplate non-continental lands; it was intended to apply to western lands which were regulated by the North-West Ordinance of 1787.

It should be noted that all the fortyeight States of America did not come into the Union all at once when it was formed in 1787. The Congress was empowered, under article IV, section 3 (1), to admit new States into the Union, the formation of a new State within the jurisdiction of any other State being prohibited. Nor, again, could any State be formed by "the junction of two or more States", or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress. Recourse was had to this power to admit new States even in the present century. For instance, Oklahoma was admitted into the Union in 1907, New Mexico in 1912, and Arizona also in 1912. The original thirteen States were Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina and Virginia. Some of the territories as contemplated in the aforesaid constitutional provision were admitted as States, and they were all continental lands.

Towards the close of nineteenth century with the extension of American imperialism the problem arose of organising, consolidating and governing outlying territories such as Alaska, Hawaii, Guam, Midway, Puerto Rico, Virgin Islands, the Panama Canal Zone, American Samoa and the Philippines. The Philippine Islands was granted formal independence in 1946. The other outlying territories

and possessions are classified into two categories, namely, incorporated territories and unincorporated territories. Alaska and Hawaii are incorporated territories, whereas the rest generally come under the second category.

4. US Citizenship Restricted on Certain Grounds

The granting of American citizenship does not, however, rest on the question as to whether a given territory belongs to the one or the other category. It is a matter determined in each case by the Congress. Citizenship may be conferred on inhabitants of the territory of either description. Where citizenship is not granted the inhabitants are treated as US nationals without citizenship, but are given diplomatic protection and immunities abroad. Generally, however, the provisions of the federal constitution and the laws of the US apply to the incorporated territories ; on the other hand, the Congress has power to make exceptions to this general rule in the case of unincorporated territories. The inhabitants of the incorporated territories are not subject to customs duties and immigration laws. They have, of course, no USA franchise or full representation in the Congress, but in other respects are treated almost on a footing of equality with the citizens of the continental United States.

The inhabitants of Alaska, Hawaii and Puerto Rico are given representation through elected resident commissioners in the House of Representatives, who may participate in debates and introduce Bills but have no right to vote. They have their own local legislatures and have the right to elect members thereof and certain other officials, but they have no right to participate in the election of the President and the Vice-President. For each territory, whether incorporated or unincorporated, the President appoints a Governor who, in an incorporated territory, holds office for a fixed term; and in an unincorporated territory, serves during the President's pleasure. The office of a State Governor is, by contrast, elective.

There is a peculiar anomaly in the US electoral system. Under that system the residents of Washington, the Union's

capital, are not entitled to vote for the President and the Vice-President. This is due to the fact that the elections to these offices are conducted by the forty-eight States; and Washington, curiously enough, is not within a State but in a federal district called the District of Columbia. That district has no representation in the Congress. It has no mayor or governor, and even the city officials are appointed by the President. In order to get rid of this legal disability some residents of the capital maintain some sort of legally recognised residence in some State or other. During the Presidential elections they cast absentee votes or return there to take part in the elections. There are others who work in the capital but actually reside in neighbouring States such as Maryland and Virginia so that, if not otherwise disqualified, they may exercise the franchise.

The outlying territories and possessions of the US must not be confused with the territories, scheduled or other, referred to in the Indian Constitution. In India citizenship is not withheld from the inhabitants of the territories because these are territories. Unless otherwise disqualified, they become *ipso facto* citizens of the Indian Union like the people of the States. As has been pointed out, the US law and practice is different, and the reason therefor is easily explained. In the US these territories and possessions are territorial accretions by purchase, cession or annexation, and their peoples had been brought under subjugation by conquest or force. Not only are they far away from the mainland, but their race, colour, language, customs, economy and the way of life are different from those of the Americans. In the US they classify persons into (1) citizens, (2) nationals who are not citizens, and (3) subjects. No such discrimination is made in India on grounds of race, colour, language or territory.

5. The Republic of Ireland's Claim to Northern Ireland

In this connection a word or two about the partition of Ireland may be appreciated. As in the case of India in 1947, so in the case of Ireland in 1921, the British Government

stated that in no circumstances would they agree to any proposals involving coercion of a considerable religious minority, Northern Ireland, that is, Ulster, was given the option to join an All-Ireland Parliament or to keep out of it. If it decided by an address to the Crown not to join Southern Ireland, no change in its constitutional position was envisaged in the Treaty or contemplated by its British or Irish signatories. It was decided to set up a Boundaries Commission in the event of Ulster electing to remain a separate political entity.

A Commission was appointed after the presentation of address to the Crown by the Parliament of Northern Ireland. It was composed of representatives of the British Government, Southern Ireland and Northern Ireland. The boundaries issue was, however, settled by the agreement of the 3rd December 1925, signed by the representatives of the three Governments. It was later confirmed by suitable legislative measures. Thus the partition of Ireland was a settled fact, and almost the same device has been repeated in the case of India. But there is one very important point of difference. Northern Ireland, unlike Pakistan, continued, for all practical purposes, in the position of a subordinate branch of the British State.

It appears from the provisions of the Irish Constitution of 1937 that Southern Ireland is not reconciled to partition, and does not recognise it as a settled fact, Article 2 of that constitution says that the national territory consists of the whole of Ireland, its islands and territorial seas. While restricting the applicability of the laws enacted by the authority of Southern Ireland within its own area with, of course, extra-territorial effect, the constitution (article 3) states that this restriction is without prejudice to Southern Ireland's jurisdiction over the entire territory of Ireland. The restriction, it is further laid down, shall hold good "pending the re-integration of the national territory".

Thus the framers of the Irish Constitution of 1937 have repudiated the two-nation theory on which the partition of Ireland into the predominantly Protestant North and the predominantly Catholic South was based. They have gone

back upon the articles of agreement concluded between Britain and Ireland, and signed by members of both the delegations in December, 1921. The plausible justification for the repudiation of the agreement by the constitutional provision of 1937 is that it was disapproved by a large number of the members of the Dail in January, 1922. de Valera and his Cabinet resigned on the issue, and a Provisional Government under Michael Collins was set up. Subsequently the new State power changed hands, and de Valera and his party were again on the saddle. In fairness to them it must be admitted, however, that they have taken the view consistently and without hesitation that the partition lacked popular support and that consequently they were not bound by the articles of agreement. They still hope that in no distant future they would get the two parts of Ireland reunited. Against this background the provisions of the Irish Constitution should be examined.

In India such a major issue as the partition of the country was decided in 1947 without reference to the people. But the two major political parties, namely, the Congress and the Muslim League, agreed to the principles as well as to the scheme of partition, and these parties are still in office in India and Pakistan respectively. As a matter of fact, the Congress controlled the Constituent Assembly which has framed our constitution. In Pakistan the Constituent Assembly, which has yet to finish its labours, is dominated by the Muslim League. That provisions, analogous to those of the Irish Constitution, have not been inserted in our constitution, should cause no surprise, having regard to the commitments of the Congress. What is more important, such declarations in a solemn document without any kind of sanction would not only be provocative but would serve no useful purpose except creating suspicion in the minds of the Muslim majority in Pakistan and widening the gulf between India and Pakistan, on the one hand, and Muslim and non-Muslim nationals of either country, on the other.

I consider the partition of India, particularly in the eastern belt, and the Congress-League acceptance of the

principles underlying its unfortunate events, but the Irish method of upsetting the agreement cannot and should not be adopted in India or in Pakistan. The decision one way or the other must be left to the peoples of the two countries who, in the course of time, may be impelled by historic forces to make a common cause and to undo a mischief done by the British ruling class with the support and connivance of the upper strata of the Hindu and Muslim communities. Neither India nor Pakistan can, by unilateral act, revoke or even denounce partition except by war which all right-thinking citizens of either State must resist. The peoples on both sides of the border may at some future date take the initiative, in mutual interest, in unsettling the settled fact when they may be in a position to see things in their true perspective and to take control of the situation. The Indian Constituent Assembly, in my judgment, have taken a correct decision in not following the Irish example in this respect.

6. The Status of Merged Indian States

Coming back to the territorial composition of the Indian Union, what, it may be asked, has happened to those five hundred and odd Indian States, except those States, which have been classed as Part B and Part C States ? To that the answer is that they have been merged in Part A, Part B or Part C States. Our constitution recognises only three categories of States. Therefore, those States, which have not been classed as any of these three categories, have ceased to be States. Their status as acceding States has been destroyed by 'merger' agreements as well as by the constitutional provisions. They may or may not exist notionally. In international law, it is well-known, there may be a State without any territory or without any people who are in habitual obedience to its sovereignty such, for instance, as some States which, during the Second World War, had been overrun by the 'enemy' and which purported to function as emigre States in foreign countries.

In the case of the Indian States, which have ceased to be States under the constitution, an anomalous position has

however, been created. For instance, the Government of India seem to take the view that it would be incorrect to refer to the rulers of these States as ex-rulers or former rulers. Thus the Maharajah of Cooch Bihar remains His Highness the Maharajah without a State and without a people to obey his orders or decrees. Cooch Bihar and such other States are no longer States or even acceding States in any political sense.

The issue as to the status and position of these States was raised, amongst other issues, in a suit filed under section 204 of the Government of India Act in the Federal Court by rulers of certain States of the former Eastern Agency on the 16th January, 1950, a few days before the constitution came into force. The suit is known as *The State of Seraikella and Other States v. The Union of India and Another (1951)*. The substance of the plaintiffs' case was that the merger and taking over of the administration of the territories concerned carried out in the exercise of powers conferred by the States Merger (Governor's Provinces) Order, 1949, made by the Governor-General under section 290-A of the Government of India Act, was a breach of the terms of the Instruments of Accession executed by the rulers and accepted by the Governor-General in August, 1947.

The Instrument of Accession in each case, it was contended, continued the sovereignty of the ruler in and over the State, and all notifications, orders or enactments issued or made in violation of the rights and obligations flowing out of the Instrument were *ultra vires*, void and inoperative. Of course, the main issue was whether the Supreme Court as the successor to the Federal Court in certain respects had jurisdiction to entertain the suit, which had been filed before the Federal Court. That, however, is a question with which we are not concerned here.

But the issue as to the status and position of the States has been examined very carefully by one of the judges. It is pointed out that the territories of the plaintiff States, by virtue of the States Merger (Governor's Provinces) Order, 1949, made under section 290-A of the Government

of India Act, were, immediately before the commencement of the constitution, being administered as if they formed part of the provinces of Bihar and Orissa. The territories of these States now comprise the territories of the plaintiff States. The subjects of the plaintiff States are now the citizens of India, their territories having been merged in the territories of Bihar or Orissa. They are no longer States in terms of the constitution.

It was, however, contended on behalf of the plaintiff States that the order made under section 290-A of the Government of India Act being *ultra vires*, and illegal, the territories of Bihar or Orissa could not lawfully comprise the territories of the plaintiff States. To this contention the reply was that the validity or otherwise of the order made under section 290-A had no relevancy. The question, as the learned judge observes, was whether the territories of the plaintiff States were, in fact, being administered as if they formed part of the provinces of Bihar or Orissa, and whether such territories were being so administered by virtue of an order made under section 290-A. The answer to that question is in the affirmative. None of the plaintiff States is included among the States named in Parts A, B and C. The Government of India Act, 1935, which recognised them as acceding States, has been repealed by or under article 395 of the constitution. Consequently, the plaintiff States have no existence as States in the eye of the law. This applies to all the States, which acceded to India and which are not recognised by the constitution as States. These together with the plaintiff States do not exist at all. The learned judge has taken a correct and sound view of the legal and constitutional position of those Indian States, which are not named as States in the appropriate schedule to the constitution.

7. Formation of New States, Alteration of Boundaries and Names of Existing States etc.

Now, Parliament by law may admit into the Union, or establish, new States on such conditions and terms as it thinks fit. It may also (a) increase the area of any State,

(b) diminish the area of any State, (c) alter the boundaries of any State, and (d) alter the name of any State. Further, it may form new States out of the existing States by readjustment of their boundaries. But no Bill in these regards shall be introduced in either House of Parliament except on the President's recommendation. Again, should such a Bill affect the boundaries of any existing Part A or Part B State or its name (not any Part C State or D or any other territories) the views of the legislature of that State as regards the proposal for the introduction of the Bill and its provisions must be ascertained before introduction (article 3). It does not mean that the views thus ascertained shall in any way bind the President or Parliament.

Suppose the Government of India decide to cut certain areas out of Bihar, and to incorporate them in West Bengal. Before the introduction of a Bill for that purpose in Parliament on the recommendation of the President the views of the legislatures of both Bihar and West Bengal shall have to be ascertained by him. Those legislatures may not agree to the introduction of the Bill or its provisions. But that does not prevent Parliament from passing the law or the Government of India giving effect to that law.

In accordance with this procedure certain areas have been separated from the State of Madras and constituted into a Part A State known as Andhra. No law incorporating changes of this kind shall be deemed to be a constitutional amendment as is contemplated in article 368. It means that any such law may be enacted by Parliament in the ordinary manner and without recourse to the special procedure required for a constitutional amendment.

Reference to the analogous provisions of some federal constitutions of the world seems relevant here. Mention has already been made of article IV, section 3 of the US Constitution where the consent of the Congress as well as of the State legislature concerned is essential to any change affecting the territories or boundaries of any State. Article 5 of the Swiss Constitution says that the Confederation guarantees to the Cantons their territory, their sovereignty within the limits fixed by article 3, and

their constitutions. The Commonwealth Parliament of Australia has power, under section 124 of the schedule to the constitution, to create new States out of an old State or parts of old States, but with the consent of the legislatures of the States affected. It has also power, under section 123, to alter the boundaries of a State, but for such alteration not only the consent of the State concerned is necessary but the approval of the electors of such State is required as well. Article 18 of the USSR Constitution states that the territory of a Union Republic cannot be altered without its consent. The Union has power to admit new Republics, and confirm alteration of boundaries between the Union Republics and the formation of new territories and Regions and new Autonomous Republics within the Union Republics. All these provisions are incorporated in article 14.

The USSR Constitution, unlike our own or many other constitutions, contains a detailed enumeration of the Autonomous Republics, Autonomous Regions and National Areas into which the Union Republics are divided for administrative purposes. This is dealt with in articles 22-29(b). When the draft amendment was being considered in 1936 it was proposed to delete the relevant articles. It was opposed by Stalin on the ground that such enumeration was necessary and should be kept in tact for the purpose of ensuring an atmosphere of certainty, stability and clarity in respect of the territorial jurisdiction of each Union Republic. It was finally dropped.

8. The Fazl Ali Commission and its Restricted Scope

Article 3 of the Indian constitution reproduces, with minor verbal changes, the provisions of section 290 (1) of the Government of India Act, thereby suggesting that the Constituent Assembly did not apply its mind to the very delicate and complicated issues, involved in the article, or that on these issues, as on many others, it had no better judgment than what the British Parliament had shown in its own interest in 1935. It is an instance of singular lack of thought and consideration on the part of the Constituent

Assembly, which is bound, as events portend, to put a severe strain on the mechanism of government which it was pleased to devise in 1950. At any rate, there is not the slightest recognition in the article of the long-standing Congress commitment as to territorial redistribution on linguistic and cultural basis by way of undoing the grievous wrong deliberately perpetrated by the British Government in imperial interests.

The appointment of a Central Commission for the reorganisation of States was, however, announced in the House of the People by Prime Minister Nehru on December 22, 1953. The Commission consists of Mr. Fazl Ali, Pandit Hridaynath Kunzru and Sardar K. M. Panikkar. It is empowered to lay down its own rules of procedure and to call for such evidence, oral or in writing, as it may deem necessary for a correct and objective appraisal of the situation in all its bearings. While announcing the appointment of the Commission the Prime Minister made a statement which indicates, in more ways than one, what considerations are expected to guide its deliberations. Pandit Nehru admits that the language and culture of an area, "have an undoubted importance, as they represent a pattern of living which is common in that area". But he insists that in considering the question of reorganisation of States there are other important factors which must also be given weight. The Commission is directed, that is, to bear in mind throughout its investigation that the policy of the Government is to reconcile the aspirations of the people of each constituent unit with the requirements of the 'nation' as a whole.

It may be recalled that a Committee had been appointed in 1948 for the purpose of enquiring into, and reporting on, the desirability or otherwise of the creation of the provinces of Andhra, Karnatak, Kerala and Maharastra and fixing the boundaries and assuring the financial, economic, administrative and other consequences of those provinces to the adjoining territories in India. That Committee known as the Dar Committee came to the conclusion *inter alia* that "the formation of provinces

exclusively or even mainly on linguistic considerations is not in the larger interests of the Indian nation and should not be taken in hand". According to that Committee, oneness of language may be one of the factors to be taken into consideration along with others, but it should not be the decisive or even the main factor.

It seems that Pandit Nehru's statement in Parliament has been largely influenced by the recommendations of the Dar Committee so that the Fazl Ali Commission is asked, in clear terms, not to treat linguistic homogeneity as the decisive or even the main factor in proposing modifications of the boundaries of the existing States or formation of new States. Some time ago Sri Rajagopalachariar was reported to have expressed the view that the demand for linguistic States was no more than a tribal idea. If I remember correctly, Pandit Nehru lent, on a subsequent occasion, the weight of his great authority to that astounding proposition. If a linguistic State is a tribal anachronism, the concept of 'nation' in our time is no less so. For, the concept of 'nation' represents or is supposed to represent a kind of unity within, which distinguishes it from the rest of mankind. To an extent this unity, real or imaginary, tends to foster exclusiveness from others. Thus the tribal mind and the nation-psyche may be traced to the same source, although they represent two different phases of social evolution.

The Fazl Ali Commission, it appears, has been asked by the Government to take into account, while making its recommendations, several factors, apart from the question of language. These factors are generally described as administrative and financial considerations. This ponderous and tendentious phrase may be reduced to a simple but equally vague word 'viability'. Viability, practicability, expediency, and national security are some of the new holy texts, which are employed, with judicious discrimination, to bolster up lost causes or to provide the grist to the mill of reaction and declining privilege. In modern times the State is, in a sense, an industry, whether it be unitary, quasi-federal

or federal. Planning is of its essence, irrespective of its institutional or class character. To-day the main resources of the community are tapped, controlled and managed by a central agency, leaving comparatively minor sources of revenues to its constituent units. The result is that the latter are required to depend largely on doles or loans from the central pool as is proved by the financial provisions regarding the assessment, collection and distribution of the resources incorporated in our present constitution. It is not suggested that financial bankruptcy of the federal units should be encouraged or advocated ; what I insist is that lack of financial resources is, by no means, a convincing or effective argument against formation or reorganisation of States on a linguistic and cultural basis. The demand for linguistic States cannot be rejected or even justifiably opposed on grounds of viability and national unity.

It appears to me that in connection with the reorganisation of States the Government of India cannot afford to evade or ignore certain relevant issues. First, the question of reorganisation obviously involves not only formation of new States but also readjustment of boundaries of the existing States with reference to language and culture. Second, once the States are formed or reorganised on a linguistic and cultural basis it is essential that as constituent units of the Indian Union they must all be placed on a footing of equality in status as well as in functions, thereby putting an end to the existing classification of States into A, B and C categories. Third, the main language of each of these component units must be accorded the status of the national language so that instead of Hindi being the only national language we should have more than a dozen national languages. I have my doubts, however, if all these issues come within the purview of the Fazl Ali Commission's terms of reference. Whether or not they do so, it is clear that unless these issues are tackled satisfactorily and without undue loss of time the present leaders of the Government of India would, I am afraid, pave the way to the disintegration of India, as India is today, just as they

were partly responsible for the division of India as India was before August 15, 1947.

9. Whether the Indian Union is a Federal or Unitary State

The question comes: is India, which, according to the constitution, is a Union of States, a federal or unitary State? Stress has been laid, in certain quarters, on the expression 'Union' as indicating, if not underlining, the unitary character of our constitution, or at least its unitary bias. Dr. Ambedkar, Chairman of the Drafting Committee, stated in the Constituent Assembly that that expression had been used to imply two things, namely, (1) that the Indian federation was not the result of an agreement by the units; and (2) that the units had no right to secede from it. The interpretation given by the Chairman was, at no stage, contradicted by the leaders of the Congress, including Pandit Nehru and the late Sardar Patel. Presumably, therefore, it had their approval.

Without meaning any disrespect to them or making any reflection on their intellectual adequacy, one may point out that it is not for the interpreters or commentators to go into the motives that might have actuated the framers of the constitution in picking and choosing expressions to reflect their subjective reactions or their mental attitudes. Unless the contrary is proved, they must interpret words, expressions or phrases in their ordinary, natural and grammatical meanings. By this test the expression 'Union' does not, by itself, convey any definite meaning. It may stand for a unitary State; it may also indicate different types of federation.

The Dominion of South Africa is not recognised as a federation by competent students of governments and political institutions. And yet the word 'Union' is used not only in the preamble to the South Africa Act of 1909, but also in several sections of the enactment itself. It is repeated in the Statute of Westminster, 1931, in the British Nationality Act, 1948, and in numerous other Acts enacted by the British Parliament or by the South African Parliament.

Here, then, is an instance of what is, to all intents and purposes, a unitary State being described as a Union.

The Dominion of Canada is known as a federation, although in the case of *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co. Ltd.*, (1914) Haldane felt constrained to observe, incidentally, that the British North America Act, 1867, had not created a true federation at all. Assuming that there is substance in the view expressed by such a competent authority which, of course, is open to doubt, there is, negatively speaking, no assertion in this view that Canada is a unitary State. It may be a federation with a strong centrepetal bias, or its constitution may be of a quasi-federal type. To be sure, it is not of the same pattern as the Government of South Africa, or the Government of Ireland or the Government of the United Kingdom. The word 'Union' is used to describe the Dominion of Canada in the preamble to the British North America Act, 1867, as well as in the section entitled 'II-Union', where the Dominion and its component units are described. We are told that in choosing the name for India Dr. Ambedkar got his inspiration from the preamble to the British North America Act. Here, then, is an instance where a federal State with unitary bias or a quasi-federal State has been called a Union.

The US, according to Dicey, "presents the most developed type of federalism". Following Dicey, many American and British writers have stated that it satisfies all the tests of federation, and conforms to the ideal federal norm. One wonders what these writers really mean when they speak so glibly of 'the tests of federation' or of 'the ideal federal norm'. Dicey's treatment of the subject is, of course, exhaustive and informative, although there were gaps, which subsequent events have exposed. That, however, is a different matter to which I shall return later on. But there is no doubt about the federal character, in essentials, of the US. In the preamble to the Constitution of 1787 the expression 'Union' is used. What is more, the word is repeated in more than one section, for instance,

in sections 3 and 4 of article IV, to describe the US. Here, then, is an instance of a truly federal State being recognised as a Union.

Take the USSR. The expression 'Union' is the title given to the first and the most powerful of the Socialist States in the world, and throughout the body of the text it is employed to describe it. Article 13 says that the Union of the Soviet Socialist Republics is a federal State, formed on the basis of the voluntary association of Soviet Socialist Republics having equal rights. It proceeds to name the sixteen Union Republics, which form the constituent units of the socialist federation. Here, again, is another instance where a federal State is called a Union. All these examples prove beyond any shadow of doubt that Dr. Ambedkar's conclusions drawn from the use of the word 'Union' with reference to India are absolutely without substance. It is not a term of art, and it may bear, as it does, different meanings in different contexts.

10. Conditions Deemed Essential to Federalism

Whether the Indian Union is or is not a federal State is to be determined not by the name which the Constituent Assembly has given it but by its conformity or otherwise to what have been generally recognised as the principles of federalism. The question is : what are the principles of federalism? Before dealing with that question or, to put it more precisely, by way of finding a clue to a correct answer to that question, I should like to take up one or two issues which are of deeper social significance. In college classrooms, in public halls and in learned discourses we hear of unitary States, federal States, quasi-federal States, 'devolutionary' States and confederations. Sometimes several independent States set up a central or national authority and constitute themselves into a federal union. Sometimes certain administrative divisions, with no pre-existing sovereignty whatsoever, are brought into some sort of federal relations. Sometimes unitary States betray signs of dissolution and are, in fact, dissolved into separate, independent States. Sometimes States, federal in legal form, tend, in substance, towards

centralisation. Sometimes confederations are transformed into federal States which, in their turn, begin to lose their federal essence. These changes have occurred in the course of the evolution of political institutions in the history of mankind in different epochs and in different countries. What, are these changes due to? What are the forces that operate behind these patterns of social behaviour? An answer to these questions may throw light on the essentials of federalism.

Dicey, who is frequently cited as an authority, says that a federal State requires for its formation two conditions. There must exist, in the first place, a body of countries so closely connected by locality, by history, by race, or by the like, as to be capable of bearing, in the eyes of their inhabitants, an impress of common nationality. It is certain, he observes, that where federalism flourishes it is, in general, the slowly-matured fruit of some earlier, though looser, connection. There must exist, in the second place, a very peculiar state of sentiment among the inhabitants of the countries which it is proposed to form into a federation. They must, that is, desire union, and must not desire unity. A desire for unity, as distinguished from union, Dicey argues, finds its satisfaction, not under a federal but unitary constitution. He goes on to add that a federal State will hardly be formed unless many of the inhabitants of the separate States feel a stronger allegiance to their own States than to the federal State represented by the common government.

Professor Wheare, who is considered a modern English authority on the subject, does not say anything new but puts the matter in a different way. The group of States or communities concerned, he writes, must desire to be united, but not to be unitary. What is the difference, one wonders, between Dicey's formula and Wheare's enunciation? If anything, Wheare's is insipid and tautologous. Later on, he tries to improve upon his own phraseology, and says that these communities desire union but, at the same time, desire separation within the

Union. What are the circumstances that lead these communities to entertain such a desire? According to Wheare, the need for common defence, the desire to be independent, geographical contiguity, and the hope of economic advantage are contributory factors. But he adds that the mere presence of all these factors will not necessarily produce of itself a desire to unite, a desire of sufficient strength to prevail over the contrary forces. What is needed is leadership or statesmanship at the right time. He names a number of historical figures from different countries who, in his view, made "all the difference between stagnation and an active desire for union."

11. Two Distinct Lines of Federal Development

That perhaps is the only new thesis in Wheare's learned dissertation. Nevertheless it is, like Dicey's, primarily and in essence a formalistic approach. The role of leadership is not denied; on occasions it proves decisive. But it is important to probe the class character of that leadership to find out the exact role played by it, and the purposes for which "an active desire for union" is roused and sought to be given a concrete shape. Broadly speaking, federations in all capitalist countries have emerged in two distinct and different ways. First, certain union States emerged originally as unified alliances of little States like the Swiss Cantons or the American States. The allegiance of the inhabitants was more to their respective States than to the loose central authority. These union States were, more or less; in the nature of confederations.

It may be recalled that the United States of America had been described in 1777 as a confederation in the Articles of Association, which came in 1787 to be drastically revised to constitute the States into a federal union. The term 'confederation' was used in the Swiss Constitution from the earliest times, and even now it is retained so that the words 'federation' and 'confederation' are treated in that document as interchangeable expressions. Originally, however, these attempts embodied the principle, if rather vague and cloudy, of the subordination of the general government to

regional governments. At any rate, the general government was, in many respects, dependent upon the regional governments. Another principle involved in confederal relations is that there is no confederal citizenship. In other words, the general government cannot operate directly upon individuals but reach them through the medium of regional governments.

As the need arose for centralising the market and guarding the customs frontiers against competition from foreign rivals with the accumulation of the surplus value, the capitalist class and their agents resorted to persistent propaganda on the ideological plane by pandering to the national sentiment, or to force for reversing the original plan and strengthening the centre at the expense of the units. In the sixties of the nineteenth century the southern States of America were forced to submit to the centre by armed violence. As Bryce has put it, "to establish it (the legal indestructibility of the Union), however, cost thousands of millions of dollars and the lives of millions of men". What Wheare calls "the leadership and statesmanship" was supplied in America by no less a person than Abraham Lincoln. Before the Civil War the territory of the US had been extended not in all cases by the voluntary wish of the inhabitants of the areas concerned but by cession, purchase and annexation, those devices with which imperialism has made us familiar.

The same pattern of development of the federal union emerged in Switzerland. A controversy arose between the conservative federalists and the new rising bourgeoisie. The former wanted to protect and guard the original terms of the contract and to maintain in tact the rights of the cantons, whereas the latter were determined to destroy the sovereignty of the cantons and to set up a unified State. The Sonderbund, the union of seven cantons, raised the question of secession from the remaining cantons. A civil war followed. The Catholic cantons were defeated in 1847, and compelled to rejoin the union. Thus the industrial bourgeoisie whose interests lay in a centralised market and centralised State, triumphed. And this bourgeois victory

was, naturally enough, acclaimed as the victory of national unity. The Swiss Constitution of 1848 is the product of this civil war, reflecting, as it does, the growth of new ideas symbolic of the rise of the bourgeoisie. Is this the kind of "leadership or statesmanship" that Wheare had in mind when he wrote so eloquently about its role in the development of federalism?

As a counterpoise to the movement for national independence either from metropolitan domination or from foreign yoke a particular type of federal relations is established in certain countries or during certain periods by devolution or grant so that the incipient secessionist movement may be neutralised and, at the same time, the inhabitants of the regional units may be cajoled into believing that their national freedom has been won and their aspirations fulfilled. This is the second way of the development of the federal union in some capitalist countries and in colonies. The machinery of the Indian administration under the British regime provides an apt example.

12. Considerations Actuating British Policy of Devolution

Throughout the entire period, particularly after the assumption of direct rule by the Crown in 1858, the source of supreme power and authority was the King-in-Parliament. The Government of India was a subordinate branch of the British State. There was, however, a large measure of devolution under the Government of India Act, 1919, which was itself a British enactment. The powers of the British Parliament were relaxed, to a large extent, in pursuance of the declared policy to provide, by gradual stages, for responsible government in British India as an integral part of the British Empire. Under section 19-A, the Secretary of State was authorised, by rules, to regulate and restrict the exercise of the powers of superintendence, direction and control vested in him and in the Secretary of State in Council.

But at the same time the basis of the British sovereignty over India was not disturbed; for, section 33 read with sections 2 and 131, made the subordination of the Govern-

ment of India to the Secretary of State complete. The Governor-General was appointed by the King on the advice of his British Ministers, and so were the Governors of the three Presidencies of Bengal, Bombay and Madras. The other Governors were also appointed by the King, but in consultation with the Governor-General. The Indian legislature had power to make laws in respect of subjects mentioned in section 65, but it was subject to numerous restrictions which were all designed in British imperial interests. Restrictions were also imposed in financial matters.

The Governor-General in Council was, however, empowered, under sections 45-A and 129-A, to make what were known as devolution rules with the sanction of the Secretary of State in Council. Under rule 3 of the devolution rules so made the functions of the local governments and the local legislatures of the Governor's provinces were distinguished from those of the Governor-General in Council and the Indian Legislature. And for the purposes of such demarcation the subjects were classified as central and provincial subjects and set out in a schedule. Part I of the schedule dealt with central subjects, whereas the provincial subjects were specified in Part II. Under rule 6 the provincial subjects were divided into transferred subjects and reserved subjects. Each of the Governor's provinces was governed, in relation to reserved subjects, by the Governor-in-Council ; and, in relation to transferred subjects, by the Governor acting with ministers. Thus a sort of dual government was set up in the Governor's provinces, the reserved half being held responsible, as previously, to the Governor-General in Council and, through him, to the Secretary of State in Council, and the transferred half being made accountable, subject to reservations, to the local legislature.

Notwithstanding these new arrangements, the sovereignty of the British State remained in tact, and the unitary character of the administration was not altered. A unitary machinery, by the way, is one in which there is a monopoly of the State power at the central level, and in which the so-called political divisions, if any, are treated as separate

units merely for administrative convenience. The provinces were administrative units of the Government of India which, in its turn, was a subordinate and minor part of the British machinery. The principle underlying this classification of subjects as central and provincial, as reserved and transferred in the provincial field, was not a federal principle. It has been called, by some writers, the principle of devolution instead. For, devolution or decentralisation is distribution of central power, by delegation or grant, among subordinate units without prejudice to the ultimate sovereignty of the centre. It was nevertheless a process of development towards regional autonomy which the British imperialists had to initiate by way of appeasing local sentiment, and counteracting the growing challenge to foreign rule. Paradoxically enough, this policy was influenced by another consideration. Apart from the communal counterpoise to the national liberation movement started openly with the famous Aga Khan Deputation in 1906, they proceeded to create new provinces by demarcation of territories in disregard of linguistic, cultural and other claims and thus set one province against another.

13. The Federal Principle Acknowledged by 1935 Act

This process was accelerated by the events of the decade and a half that followed; and in form, though not in substance, the federal principle was recognised in the Government of India Act, 1935. The Act resumed, by and under section 2, into the hands of the King all powers exercisable in, or in relation to, India, by any authority, and then allocated to the various authorities constituted thereunder the whole of those powers in so far as they were distributed. It left the King free to delegate such of those powers, outside the scope of statutory distribution, as he thought proper, to the Governor-General or the Governor to be exercised on his behalf. The Crown's functions in its relations with the Indian States were exercised in India by its representative. There were two offices—the office of the Governor-General and the office of the Crown's, representative in

relation to the Indian States. Both the offices could be held at the same time by one person, and, in fact, were so held during the operation of the Act.

Provision was made by section 5 read with section 2 for the establishment of federation and for the accession thereto of the Indian States. There was distribution of legislative powers between the centre and the units under Part V and the Seventh Schedule. Subject to necessary changes, the division of administrative powers conformed to the broad plan of distribution of legislative powers. The distribution of revenues was effected partly on the basis of the division of legislative powers and partly under Part VII. The Act contemplated, subject to safeguards, complete ministerial responsibility in the provinces and a dual government at the centre. But the federal scheme as envisaged under section 5 was not put into operation. The Princes refused accession because they apprehended control by the rising Indian bourgeoisie supported during that period by the intelligentsia. The Congress opposed the scheme because it did not satisfy the nationalist aspirations. The Muslim League, which as an organised party was not yet a great force, was not enthusiastic either, because it feared Hindu domination.

It was an exceedingly difficult and complicated situation that faced the world during those years. The capitalist crisis, on an international plane, was fast reaching a breaking point despite the Roosevelt 'deals' in America and the British 'peace' interlude with Hitler under Chamberlain. In India the conflict was sharpening between British finance capital and monopoly market and indigenous capital. There was conflict between Hindu and non-Muslim capital, on the one hand, and weaker Muslim capital, on the other hand, and also between the bourgeoisie and the crumbling feudal order represented by the Princes. In the background the workers and peasants, though not effectively organised, were arrayed against all those vested interests. The intelligentsia were bewildered by the lightning speed of these events.

The federal scheme was not withdrawn but was kept in cold storage on the ostensible ground that it had not for the time being commended itself to acceptance by the parties concerned. But Part III of the Act, which, concerned the framework of the Provincial Administration, was put into operation in 1937 ; and the scheme of distribution of powers, in so far as it applied to the centre and the units, was enforced. For British India it was, in form, a federal scheme inasmuch as two sets of authorities with defined legislative and administrative powers functioned. It was so in form only and not in substance, because the Governor-General was given drastic powers of intervention in provincial affairs, which were frequently exercised. What is more important, the sovereignty of the British State was not withdrawn or seriously affected.

That sovereignty came into full play when Britain became involved in war against Germany. The federal pretensions of the Act came to be exposed in their naked form for the duration. During the war the British imperialists resorted to vague declarations of policy rather than to specific statutory provisions as an instrument of appeasement. The Indian bourgeoisie were kept in good humour by war 'deals' and contracts. The events that followed have been dealt with in Chapter VIII, and need not be repeated here.

It is significant that the line of development in India *mutatis mutandis* has been, for all practical purposes, the same as that in Canada or Australia. The British North America Act, 1867, and the Commonwealth of Australia Act, 1900, were both British statutes, although in both the cases the proposals to constitute the colonies into federations had been initiated locally—in Canada through the famous Quebec resolutions of 1864, and in Australia through the resolutions of the Premiers' Conference held in Melbourne in 1899. The colonies were British in law and in fact. The British sovereignty was not eliminated either in Canada or in Australia even when they were constituted into federal

unions. In these cases, too, the factors that contributed to federalism were (1) the British colonial strategy of appeasement of local aspirations as a counterpoise to a possible movement for secession along American lines; (2) the need for centralised markets under centralised States on the part of the colonial bourgeoisie; and (3) the urge of economic collaboration between the colonial bourgeoisie and their British counterpart as a sort of offensive and defensive plans against non-British capital and colonial farmers and labourers. What Wheare calls "leadership and statesmanship" was supplied by the colonial and British bourgeoisie and their ideological and political exponents at the highest levels of the Administration.

There is no denying the fact that in the historical development of federalism the component units, generally speaking, had some sort of pre-federal association or connection, which contributed to the desire for union, without prejudice, however, to their local or regional autonomy. It was an association or connection based, more or less, on geographical contiguity, economic cohesiveness, common historical tradition and identity of race and language and, to put it briefly, on a sense of common nationality. Such association or connection may, as indeed it does, nevertheless contain germs of conflict due mainly to economic disparities between different classes and different norms of culture fostered by these economic disparities. This conflict may engender the desire, as it does, for independence, within or without. A desire for union coupled with a desire for independence within prepares the ground for a federal union, whereas a desire for independence without, irrespective of certain formal affinities, paves the way to secession or complete separation. But the desire in either direction may be suppressed or controlled by force, and a federation, as history shows, is not necessarily a voluntary union, willingly agreed to by the inhabitants of its component units, or even by the component units themselves.

14. The Effect of Capitalist Crisis on Federal Norms

One or two trends are noticeable in this connection. A confederation, in the first place, is a possible phenomenon in conditions where capitalism is not well organised. It is, more or less, a dynastic feudal category. With the development of big capitalist industry, mass production and finance capital in the nineteenth and twentieth centuries confederations have practically ceased to exist. In the place of confederations other types of alliance are being fostered and developed. The British Empire furnishes a classical example. The State power was originally concentrated in London, although the Empire had wide territorial ramifications and brought under its sway multitudinous races, nationalities and races with no right to manage their own affairs. Conflicts naturally arose, and in order to tackle them a measure of decentralisation was introduced by the metropolitan authority. The white settlers in the colonies were granted self-government, and then some of the colonies were raised to the status of the Dominions.

To arrest the process of disintegration almost similar measures have been adopted in respect of the coloured peoples in the East, for instance, Indians and Ceylonese. It is now called the Commonwealth and Empire. The sovereignty of the Commonwealth States is conceded, but a novel procedure of taking decisions by consultation and discussion is being evolved and systematised as the basis of collaboration in matters of common interest. Besides, regional agencies have been or are being created such as the NATO, MED, EDC for dealing with matters relating to the maintenance of internal peace and security by regional action within the professed purposes and principles of the UN.

In the second place, the crisis of capitalism brought about by competition in the capitalist market, the division of the world's market into the capitalist sector and the socialist sector, the national upsurge in the colonial countries and the conflict between labour and capital in the capitalist countries themselves, accelerates the trans-

formation of federal unions in form into unitary States in substance. So scholars and students of the orthodox school seek to draw a fine distinction between federal constitutions and federal governments, between theory and practice, between the law as it stands and its actual operation, without investigating the question why and how these contradictions occur. The form is preserved lest its withdrawal should disturb the public equanimity, but behind the form the contrary forces are allowed to operate unseen and undetected.

In a desperate situation even the form is abandoned to ensure freedom of action by the giant capitalist apparatus with all its coercive power. In the result, a federal State becomes highly centralised, and centralisation is nothing but the transfer of power from the member-units to the higher unitary whole. In the initial stages, it is no more than a tendency; by the impact of such productive relations as are reflected in world-wide depressions, slumps and wars, cold or hot, the tendency is soon transformed into an accomplished fact. In both Switzerland and the US the State power is being rapidly shifted from the constituent Cantons and States to their respective centres. The possible consequences of this development are either complete centralisation with no autonomy for the member-units, or rebellion in a new social setting; and force, again, finally decides the issue, as it did in Switzerland in 1847, and in America in 1860.

15. The Federal Structure in USSR

All this leads to the question as to whether the USSR is, in substance, a federal State. Wheare admits that its constitution describes itself as federal and envisages a federal government. But then he writes that if the powers conferred by article 14 upon the centre are exercised in practice, then very little of the federal principle remains in the USSR. There is no reason to believe that in the Soviet land practice should conflict with theory. Stalin repeatedly stated that the Soviet Constitution was not a formal document, that it did not contain propositions or formulas

which had no relation to reality. It was, he said, a record of actual achievement. Therefore, Wheare may rest assured that the powers enumerated in the article he quotes are not only intended to be exercised by the centre but are, in fact, exercised by it. But how does it, one may ask, detract from the federal principle which is declared to be the basis of the USSR?

In repelling the suggestion made by Haldane in the case of *Attorney-General for the Commonwealth v. Colonial Sugar Co. Ltd.*, I wrote in my book entitled *The Problem of Minorities* (published in 1940 by the University of Calcutta) as follows : "With respect to his lordship and the Judicial Committee of the Privy Council, it is submitted that there are two different types of federal government, each equally orthodox, although one may be centripetal in bias and the other centrifugal A statutory division of powers between the centre and its constituent units, which neither the centre nor the units by themselves can alter and which is subject to the interpretation of courts, is of the essence of federalism'. No originality is claimed for this definition. It is so obvious from a careful examination of the provisions of the recognised federal constitutions. The proposition contained in the above quotation constitutes what I call the Federal GCM.

Now, take Wheare's test for a federal government. Does a system of government, he asks, embody predominantly a division of powers between general and regional authorities, each of which, in its own sphere, is coordinate with the others and independent of them? If it does, that government, he writes, is federal. Wheare does not mention "the interpretation of courts" in his definition, and that, in effect, is the only point of difference between his definition and mine. Apply Wheare's test to the USSR, and not exactly mine, and there is nothing to justify his statement that very little of the federal principle is left in the USSR.

The Soviet Union is a system of government which, in the first place, embodies predominantly a division of

powers between general and regional authorities. Each of these authorities in its own sphere, in the second place, is coordinate with the others and independent of them. How can one resist the conclusion that the USSR, which is such a government, is federal? One must remember that Wheare's test gives no weight to the comparative importance of the subjects allocated to the centre as distinguished from the residuary retained by the units. Nor can the importance of subjects be assessed except in the context of the Soviet pattern of life, about which this British scholar naturally betrays no enthusiasm.

16. Equality of Status for Union Republics

The USSR is not based on the principle that the sovereignty is unitary in essence and, therefore, indivisible. The constitution acknowledges the sovereignty of the constituent republics, and article 15 says that it is limited only within the provisions set forth in article 14, on which Wheare ardently relies for his astounding thesis. Outside of those provisions, each union republic exercises its residual sovereignty independently. The sovereignty of the union republics is proved by the following : (1) that the territory of a union republic cannot be altered without its consent (article 18) ; (2) that each union republic has the right freely to secede from the Union (article 17) ; and (3) that each union republic has its own constitution (article 16). These prove not only their sovereignty but the equality of rights.

The equality of rights is further ensured by articles 38 and 47, which provide for equality, in the matter of legislation, between the Soviet of the Union and the Soviet of Nationalities; by article 40, which requires that the laws passed by the Supreme Soviet shall be published in the languages of all the union republics; and by article 35, which provides for equal representation of the union republics in the Soviet of Nationalities on the basis of twentyfive deputies from each union republic. The Union, on top of all this, is a voluntary association of republic which, on American or Australian analogy, may be called States.

To prove his contention that the USSR is not a federal State, Wheare seems to think that article 19 is decisive. What does that article say? Well, it provides that the laws of the USSR have the same force within the territory of each union republic. Does he mean that the laws of the US Congress have not the same force within the territory of each State, that the Swiss federal laws have not the same force within the territory of each Canton, that the laws of the Australian Parliament have not the same force within the territory of each State? And these he cites as examples of truly federal unions. If his answer is in the affirmative, then it is contrary to fact. For, the federal laws of these unions extend to the territory of each of their respective constituent units and operate upon their respective peoples. If his answer is in the negative, then his 'decisive' case goes decisively against him. It is, of course, fantastic to suggest that the federal laws have no application within the territories of the component units of a federation.

Perhaps Wheare has misquoted the article. What apparently was in his mind is article 14 (k), which places within the jurisdiction of the USSR the "approval of the consolidated State budget of the USSR as well as of the taxes and revenues which go to the All-Union, Republican and local budgets". Has his attention been drawn to article 60 (c), which vests in the Supreme Soviet of a Union Republic the power to approve "the national-economic plan and the budget of the Republic"? What, one may be permitted to ask, is Wheare's exact idea of the Soviet budget, of Soviet revenues and Soviet economic planning? For, an adequate and clear knowledge of these is, I contend, essential to a correct appreciation of the Soviet system. Over a long period of time in English as well as in American courts certain rules of construction of statutes and constitutions have been evolved, and one is entitled to presume that English and American scholars are aware of them. One of the very familiar rules is that if the text is explicit, the text is conclusive alike in what it directs and what it forbids.

When, however, the text is ambiguous, as for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the constitution. Another rule is that when there is doubt the relevant articles must be read together, and the language of the one interpreted, and, where necessary, modified by that of the other.

17. Distribution of Soviet Power in Legislation and Administration.

Applying these rules of interpretation to the USSR Constitution, one finds nothing to warrant the conclusion which Wheare has reached. It will be seen that even in the economic field, in which the planned socialist economy calls for a good deal of centralisation, the union republics are given ample powers. The USSR, broadly speaking, formulates the basic principles, as for instance, those relating to labour legislation and to the use of land as well as to the use of natural deposits, forests and waters, and so on. But within the limits of those principles each union republic directs the preparation of its budget and the budgets of the territories, regions, districts and cities; 'establishes' local taxes and levies ; manages insurance and savings other than those of all-Union importance; directs local industry, the construction of houses, the building of roads, local transport and communications. Therefore, articles 14 (k) and 60 (c) must be read together, and the language of the one interpreted and, if necessary, modified by that of the other. There is, in this view of the Soviet system, no substance in Wheare's contention that the powers assigned to the union republics are of little or no significance.

Some idea of the allocation of functions in the field of administration may be gathered from Chapters IV-VI of the USSR Constitution. These relate to the highest executive and administrative organs of the USSR and of the constituent units known respectively as the Councils of the People's Commissars of the Union and the Council

of the People's Commissars of the Union Republics. These correspond to the Ministries in our country and the Administrative Departments in the US.

At the centre there are two types of commissariats, namely, (1) All-Union People's Commissariats, and (2) Union-Republican People's Commissariats. The former discharge the functions assigned to them (those relating to defence, foreign affairs, foreign trade, chemical industry, heavy modern machine building industry etc.) throughout the territory of the Union directly or through bodies appointed by them. The latter, on the other hand, perform their functions (those relating to State grain and live-stock farms, State security, food industry, fishing industry, textile industry etc.) through the corresponding People's Commissariats of the Union Republics. Only a limited number of enterprises according to a list confirmed by the Presidium of the Supreme Soviet of the USSR is administered by them directly.

The People's Commissariats of a union republic are also, as at the centre, of two kinds, namely, (1) Republican Commissariats, and (2) Union-Republican Commissariats. The former administer the subjects entrusted to them such as education, local industry, municipal economy, social maintenance and motor transport. They are subordinate only to the Council of the People's Commissars of the Union Republic. The latter, on the other hand, discharge the functions entrusted to them, such as relate to subjects corresponding to those within the purview of the Union-Republican Commissariats of the USSR.

It is clear that the subjects are listed as (1) Union subjects, (2) Republican subjects, and (3) Union-Republican subjects, more or less, analogous respectively to our (1) Union List, (2) State List, and (3) Concurrent List. Unlike our own, the residuary in the USSR, as in the US and in the Commonwealth of Australia, belongs to the union republics. There is, again, no *non-obstante* clause governing the relations between the union and republican subjects, as was provided for in the Government of India Act, 1935, and, almost verbatim reproduced in our present constitution.

There is, of course, provision to the effect (article 20) that in the event of discrepancy between a law of a union republic and an all-union law, the latter prevails to the extent of discrepancy. There is no question of any discrepancy arising in a field where the demarcation is clear and the text of the law free from ambiguity. In any event, the principle of union supremacy does not apply to the republican subjects and the residuary. Nor should any discrepancy be presumed from the apparent contradictions in the Concurrent field. Such contradictions are to be resolved by recourse to the rules of interpretation already referred to. Where, however, the discrepancy cannot be reconciled at all, the provision of article 20 shall apply.

That this provision does not of itself detract from the federal character of the USSR Constitution will be clear from the analogous provision of section 109 of the Schedule to the Commonwealth of Australia Act, 1900. One very important point of difference between the Soviet system and the American or any other bourgeois system is that in the USSR, contrary to the law and practice in the latter countries, the interpretation of the laws of the union, is left, as under article 49, to the Presidium of the Union's Supreme Soviet. This is explained by the basic pattern of the Soviet system which considers the bourgeois separation of powers an illusion.

All this shows that the USSR is neither a confederation nor a unitary State. It is, in form and in content, a federal State. It is not a confederation because the centre is not subordinate to, or dependent upon, the units in its own allotted sphere despite the constitutional provision according the right of secession to every union republic. It is not a unitary State because the sovereignty is distributed between the centre and the units. It is not a nation-State ; it is a multinational State which acknowledges the equality of nations or of nationalities. In many respects it is *sui generis*, but there is no doubt about its federal essence. It is multinational in form but socialist in content.

18. The Soviet Concept of State Power Alien to Bourgeois Scholars

The entire Soviet system and the principles on which it is based are so novel that students and scholars steeped in the legal and constitutional lore of the nineteenth century find it difficult to appreciate their inner significance. The conflicts of the nature that occur so frequently within a bourgeois State or between the centre and its component units or between the units *inter se* are generally unknown to the Soviet system. There is, for instance, no conflict, under the Soviet relations of production, between the national bourgeoisie and the regional bourgeoisie, between the bourgeoisie and the feudal order or between these both and the workers and peasants, as it is bound to arise in conditions of private ownership and control of the instruments and means of production. That is obviously because the exploiting classes have been eliminated. The USSR is a socialist State of workers and peasants, and all property, except where some personal property is permitted, is socialist property either in the form of State property or in the form of cooperative and collective farm property.

What, then, can be the bone of contention between the republics or between the republics on the one hand and the union on the other ? There can be none, and there is none. All the peoples and the union republics—and there are no classes in the bourgeois sense—are committed to a socialist order, and the entire land mass is an arena of socialist planning, building and construction. Herein lies the difference between the territory of a capitalist State, call it parliamentary or presidential, and the territory of the Soviet State. In the economic field or in the field of social security one cannot and must not assume the existence of such conflicts within the Soviet State as arise from time to time in conditions of monopoly capital or private ownership as a means of exploiting the working classes in factory and field.

There are, of course, differences, not conflicts, in the cultural-social field between different nations or nationalities, and between the component units of the union. These

differences are not suppressed. On the contrary, the initiative rests with the regional authorities in respect of art and literature, language and script, folk song and music, and every shade and variety of cultural development. There is no interference from the centre.

19. Conditions Conducive to Federalism

The circumstance that leads to the formation of federal States is the prevalence, among the people of a country, or of more or less allied countries, of two apparently contradictory feelings (1) the desire for a common, central seat of authority, and (2) the determination to achieve or maintain the right to develop themselves in their own way in their respective areas, zones or regions.

Where these feelings are readjusted or reconciled a federal State normally comes into existence. In those cases, however, where no such readjustment or reconciliation is possible it may so happen that the contradictory feelings lead to the break-up of the country and to the formation of different States. Sometimes, again, by the use of force, the regional or local patriotism is suppressed and a unitary State is formed, maybe with certain institutional federal forms.

Dicey says that a federal State is a political contrivance intended to reconcile national unity and power with the maintenance of the 'State rights'. This definition presupposes the prior existence of States, otherwise the question of "the maintenance of the State rights" cannot simply arise. History, however, shows that a federal State may emerge without pre-existing States. It also bears the implication that a federal State, without destroying the State rights, leads to the merging of nationalities in a national whole, which he calls "national unity and power". That may or may not happen. For instance, in the US they are an American nation, whereas in the USSR they do not call themselves the Russian nation. They are Russians, Georgians, Ukrainians, Bylo-Russians, and so on.

The Soviet system is a mechanism of socialist power distributed between a central socialist authority and

sixteen socialist republics. The aim of such a federation is not to give effect to the 'sentiments' to which Dicey referred, namely, "the desire for national unity, and the determination to maintain the independence of each man's separate State". Its aim, on the contrary, is to build socialism and to facilitate its transition to communism through designated central and republican authorities so that the peculiar norms of cultures of diverse nationalities comprising the union may not be suppressed or destroyed.

20. Three Leading Characteristics of Federalism

From Dicey's definition flow, according to him, three leading characteristics of completely developed federalism. These are (1) the supremacy of the constitution; (2) the distribution, among bodies with limited and coordinate authority, of the different powers of government ; and (3) the authority of the courts to act as interpreters of the constitution. Apparently, no exception may be taken to this interesting analysis, but what is apparent is not necessarily real. About point (2), that is, the distribution of powers among coordinate authorities in a federation, there is no doubt, and that, as I have said, is of the essence of federalism.

As to point (3), Dicey assumes the independence of the courts, which is brought to bear upon their decisions on issues involving conflicts of jurisdiction between the centre and the component units or between the component units *inter se*. That assumption might have been justified in conditions of stable or progressive capitalism in the nineteenth century. Even then, fundamentally there was doubt about what they call judicial independence having regard to the source and sanction of the judicial power, the class sympathies of the members of the judiciary and the patronage and different kinds of pressure to which they have always been exposed. It is true that, on surface, the courts appear to act impartially and independently as interpreters or even as guardians of the constitution, but in modern times, in particular, the judicial independence

is a fiction. The USSR does not play it up because its peoples think that the building of socialism, which is their primary and principal task, is not the function of the courts but of those to whom the initiation and execution of policy are entrusted by the workers and peasants.

As regards point (1), that is, the supremacy of the constitution, the proposition is correct, but in a limited way. According to Dicey, as the sovereignty of Parliament is a characteristic feature of the British constitutional system, so is the supremacy of the constitution, on the whole, peculiar to a federal State. But the fact is that the supremacy does not belong to any organ of government or to the constitution but to the class that is in power in a given country. In Britain the supreme political power has passed into the hands of the City of London. In the US Wall Street has appropriated it to itself. In the USSR it is exercised by the workers and peasants. The ruling class in every country operates it through different organs, and these are called the legislature, the executive and the judiciary.

The constitution reflects the desires, aspirations and achievements of the ruling class. Its rules or conventions are observed and respected so long as they do not come into conflict with the class interests. They are given the go-by, ceremoniously or unceremoniously, once they are found ineffective or inadequate. Until such time, of course, the various organs of government as well as the central authority and the regional authorities too operate within the limits set by the constitution, and in this sense the supremacy of a federal constitution is to be understood. In Britain Parliament is competent to enact any law, whether or not it affects the constitution, by a simple process. In a federation the constitution normally makes a distinction between ordinary law and constitutional law. The latter requires that while an ordinary law may be enacted in a simple, ordinary manner, a special procedure must be gone through for a constitutional amendment.

In that sense Dicey calls a federal constitution rigid as distinguished from the flexible British Constitution. But,

in fact, a federal constitution is no more rigid than it is supreme. Conversely, it is no more supreme than it is rigid. Dicey says, again, that because a federal constitution is supreme it must be written as well. No constitution is wholly unwritten, and perhaps there is no organised political community in the world, federal or other, which is governed, or allows itself to be governed, entirely by a written constitution. In a formalistic sense, too, there are written constitutions for unitary States, no less than for federal States. In earlier times in England, it is true, the ruling class thought it better and perhaps more effective to leave many things unsaid and unspecified. Certain forms and procedures were evolved over long periods, and they call them the conventions of the constitution. Certain views were expressed by judges and recognised and enforced by the ruling class, and they call them the principles of common law. They are not written down in the ordinary sense. But even in England, thanks to the development of administrative law on a rapidly increasing scale, there is today a vast body of statutes and rules which are of far-reaching constitutional significance. Whatever might have been the exact position when Dicey enunciated his thesis, it can no longer be said that the British Constitution is essentially unwritten. Therefore, Dicey's line of distinction between written and unwritten constitutions is becoming thinner everyday in view of the appalling crisis of our time.

The constitutional demarcation of functions in a federal State is, of course, universally admitted, and it is, in a way, characteristic of every federation known to us all. But if it is essential, as is suggested by Dicey and many others, that several independent States, more or less allied, must form a federal union, then neither Canada nor Australia is a federation. For, the colonies, out of which these unions were formed, were absolutely under British control, and were not independent States. This, therefore, is a test, which must be rejected, because it does not correspond to the facts of history. If, again, it is essential, as Haldane held in a Privy Council decision more than once cited in

this book, that the residuary in a federal union must belong to the Component units, and not to the centre, then Canada is not a federation. This test, too, must be rejected because in modern times the enumeration of the distributed powers is so exhaustive that the residuary as a crucial factor for the determination of relations between coordinate authorities has lost its old character. If, further, it is essential, as is insisted by certain Soviet writers, that in a federal union every constituent unit must have the right of withdrawal, then all well-known federations of the world, with the exception of the USSR, cease to be federations. This test will not commend itself to thinkers or writers, whose nation-State psychosis is still a resistant to the consciousness of new political or social phenomena.

21. Constitutional Provisions Detracting from Federal Basis of Indian Union

Now, from the point of view of the distribution of powers and of its justiciable quality, but perhaps by no other test, the Indian Union may be called a federal State. Even in these respects there are restrictions and reservations, which would be presently examined. The provisions that detract from the federal principle of our constitution may be briefly set forth as follows :

1) Parliament has power, by unilateral action, to alter the boundaries, names and territories of the component States. Such modification or change is not treated as a constitutional amendment and, consequently, may be effected through the ordinary process of legislation and without the consent of the States concerned and their people (articles 3 and 4). With necessary changes, it is a reprint of section 290 of the Government of India Act, 1935.

2) The Component States (A, B and C), D territories and other territories are not treated on terms of equality for legislative or administrative purposes. Part C States, D territories and other territories are, more or less, administrative units of the Centre. Again, although, on the whole, Part B States are accorded the same status as Part A States in certain respects, for a period of ten

years from the commencement of the constitution or for a longer or shorter period as Parliament may provide in respect of any State, the Government of every Part B State shall be under the general control of the President, and comply with any particular directives that he may give from time to time. It is, of course, open to the President to issue an order directing that these provisions shall not apply to any State specified in the order (article 371). Preferential treatment is accorded to the State of Jammu & Kashmir as compared with the other Part B States (article 370). There is no equality of representation, qualitatively or quantitatively, for the component States to whichever Part they may belong, in the Council of States (article 80 and the Fourth Schedule). The representatives of each Part A or Part B State shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote. Representation of Part C States is on a different basis as prescribed by parliamentary legislation. There is, besides, provision for nomination by the President.

Now, representation of the component units in the federal second chamber through the regional legislatures, but not through popular elections, according to Wheare, is symbolic of the confederal, as contrasted with the federal, principle. He thinks that this makes the centre dependent, to a certain extent, on the units. He refers to the Swiss Council of States, the election of whose Cantonal representatives is determined by the Cantons themselves. In the US, too, until 1913, the States' representatives in the Senate were elected by the legislatures of the States. I see no difference between these two methods from the point of view of the federal principle except that the representation through the legislatures is less democratic than that through popular elections.

3) For a period of five years from the commencement of the constitution Parliament has power to make laws with respect to certain matters include in the State List as if they were concurrent subjects (article 369).

4) With regard to the distribution legislative power, the jurisdiction of the centre applies notwithstanding anything contained in the clauses relating to the jurisdiction of the relevant States, whereas the jurisdiction of the States, even in their exclusive field, is subject to the clauses relating to the jurisdiction of the centre (article 246). This is what is called *non-obstante* clause. Although its application is very much restricted and must be so from the very nature of the principle of distribution, as was held by the Federal Court in *re the Central Provinces and Berar Motor Spirit and Lubricants Taxation Act, 1937*, it underlines the rule of central supremacy over the so-called State rights. This is taken almost *verbatim* from the analogous provisions of section 100 of the Government of India Act, 1935.

5) Parliament may make law, though temporarily, with respect to any entry in the State List for the whole or any part of the territory of India provided that the Council of States declares, by a decision of not less than two-thirds of the members present and voting, that it is necessary or expedient in national interest that Parliament should legislate as to that subject (article 249).

6) The Governor or Rajpramukh of a State may reserve Bills duly passed by the State legislature for the consideration of the President. For a certain kind of Bills reservation is mandatory. Bills so reserved may be disallowed by the President. It is true that the power of disallowance is not conferred on him in express terms, but there is little doubt about the implication of the provision (articles 201 & 238).

7) The Governor of a State, unlike the Governor of a State in the US, is appointed by the President, and holds office during his pleasure (articles 155-156). The President presumably acts in this behalf on the advice of his Ministers, especially the Prime Minister, who in his turn takes into consultation the Chief Minister of the State concerned. Whether the Prime Minister does or does not give weight to regional opinion depends on

various factors, and it may well be that a strong Chief Minister with powerful local backing will, in the course of time, render central control over such appointment into a formal affair. The trend, however, is in the opposite direction partly because of the present ruling party's bias in favour of a strong centre and partly because the country has not yet recovered from the shock of partition and from the terrible happenings which preceded or followed it. The President has power to make such provision as he thinks fit for the discharge of the Governor's functions in any contingency not provided for in Part VI, Chapter II. of the constitution (article 160).

Rajpramukhs of Part B States must be recognised by the President except in the case of Jammu & Kashmir, where the head of the State is given a different name, and is locally elected and then approved by the President. He is called *Sadar-e-Riyasat*. Where the Governor or Rajpramukh is required to act in his discretion, he is no more than an agent of the centre. The possibility of conflict between the centre and the units is not completely ruled out on the issue of the Governor's or Rajpramukh's functions, but the weight of law is on the side of the centre.

8) In the exercise of its executive power every State must see that the central laws are complied with and that the exercise of the central executive power is not impeded or, in any way, prejudiced. In these respects the State is subject to such directions as may be given by the centre (articles 256-257). The Union may also direct the States as to the construction and maintenance of means of communication declared by it to be of national or military importance. This is without prejudice to Parliament's power to declare highways or waterways to be national highways or waterways and to the Union's power in regard thereto. The Union has itself power to construct and maintain means of communication as part of its functions with respect to naval, military and air force works. Directions may be given by the centre to a State as to the measures to be taken for the protection of

the railways within the State. Of course, provision is made for the payment by the Government of India of such sum as may be agreed or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra cost incurred in this behalf by the State (article 257).

A law made by Parliament may confer powers and impose duties, or authorise the conferring of powers and imposition of duties, upon a State or officers and authorities thereof, notwithstanding that it relates to a matter in respect of which the State legislature has no power to make laws. Here, also, the Government of India are to pay for the extra cost incurred by the State (article 258). These provisions, again, are lifted from the provisions of sections 122-127 of the Government of India Act, 1935.

9) The President may at any time establish an inter-State Council in public interest, and define its duties and organisation and procedure. The Council may enquire into, and advise upon, disputes which may have arisen between the States; investigate and discuss subjects in which the Union or any or all of the States have a common interest; and make recommendations upon any such subject and, in particular, recommendations for the better coordination of policy and action in regard to that subject (article 263).

10) Should any State fail to comply with, or give effect to, any directions given by the Union in the exercise of its executive functions under any of the provisions of the constitution it would be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the constitution. This is by no means an extraordinary or emergency power; it may be used by the President on the advice of his Ministers at any time (article 365).

11) While a Proclamation of Emergency is in operation, the Union's executive power shall include the giving of directions to any State as to the manner in which the latter's executive power is to be exercised. Besides,

in such a situation Parliament shall have power to take law in respect of any entry in any List of the Seventh Schedule, and in the exercise of this power duties may be imposed upon the Union, or officers and authorities of the Union as regards that matter. Again, the President may by order direct that the provisions relating to financial relations between the centre and the units (articles 268-79) shall have effect subject to such exceptions or modifications as he thinks fit. The President may by order further declare that such of the fundamental rights as are mentioned in the order shall not be enforceable by any court and that all pending proceedings in any court for the enforcement of such rights shall be suspended for the duration of the Proclamation or for such shorter period as may be specified in the order. These are consequences of a Proclamation of Emergency.

The President may make such a Proclamation in the event of (i) war, or (ii) external aggression, or (iii) internal disturbance, threatening the security of India or of any part thereof. The Proclamation may be made even before the actual occurrence of any of these events. It should be noted in this connection that the President has no power to make a Proclamation of Emergency for the State of Jammu & Kashmir if the security of that State is threatened only by internal disturbance. That is to be tackled by the Government of the State concerned. No such exemption applies to any other State (articles 352-354, & 359).

12) The President may also make another kind of Proclamation (not a Proclamation of Emergency) if he is satisfied that a situation has arisen whereby the financial stability, security or credit of India or any part thereof is threatened. In such a situation the Union executive may direct any State to observe certain canons of financial propriety, and issue such other directions as the President may deem necessary and adequate for the purpose. The directions may include modification of the normal procedure as to Money Bills in a State and the provisions relating to the salaries and allowances of public servants, including the High Court and Supreme Court Judges (article 360).

13) The President may make a third kind of Proclamation (not, again, a Proclamation of Emergency) if, on report from the Governor or Rajpramukh of a State or otherwise, he is satisfied that a situation has arisen which the Government of the State cannot be carried in accordance with the provisions of the constitution. In such a situation the President may assume to himself at any of the functions of the Government of the State, at any of the powers of the Governor or Rajpramukh or any body or authority in the State other than the State legislature. He may declare that the powers of the State legislature shall be exercisable by or under the authority of Parliament. He may suspend, in whole or in part, operation of any constitutional provisions relating to body or authority in the State. He cannot, of course, assume the powers of the High Court or suspend operation of any constitutional provision relating to High Court. Where it is declared under this Proclamation that the powers of a State legislature shall be exercisable by or under the authority of Parliament extraordinary powers in regard to legislation, administration and finance may be conferred on the President by Parliament (articles 356-357).

14) Parliament may by law provide for the creation of All-India Services common to the Union and the States, if the Council of States declares by a resolution supported by not less than two-thirds of the members present voting that it is necessary or expedient in the national interest so to do. This provision restricts the power of the State to recruit its own officers, particularly of higher cadres, who are generally put on administrative of great responsibility and trust. From the commencement of the constitution the services known as the Indian Administrative Service and the Indian Police Service have been treated as All-India Services. These services must not be confused with the Union Services whose function are mainly confined to the affairs of the Union, as contrasted with the State Services which are concerned with the affairs of their respective States (articles 309-312).

15) Hindi in Devanagri script has been recognised by the constitution as the official language of the Union (article 343). There are, of course, provisions in respect of fourteen regional languages, including Hindi (articles 344, 351 and the Eighth Schedule). Special provision has also been made in regard to languages spoken by particular sections of the population of States (article 347). But the constitution contains a directive for the development of the Hindi language so that it may serve as a medium of expression for all the elements of the composite culture of India (article 351). The recognition of Hindi as the official language, to the exclusion of the claims of several very important language groups throughout India, has given cause for legitimate complaint among large sections of the population.

In no other country, where more than one language are spoken and have developed morphology, style and expression, and are cherished by large language groups, have the legitimate claims of such groups been so completely and callously ignored or disregarded as in India. The USSR, it has already been pointed out, recognises as the official languages of the Union the languages of the sixteen Union Republics (articles 40 and 143). The Swiss Constitution provides that the three principal languages spoken in Switzerland—German, French and Italian—are the national languages of the Confederation (article 116). The Federal Assembly, who appoints the judges of the Federal Tribunal and their substitutes, is required to have regard to the representation of the three national languages (article 107). In the Dominion of Canada both English and French are recognised as national languages. It is laid down that the Acts of the Parliament of Canada and of the Legislature of Quebec (a predominantly French-speaking Province) shall be printed and published in both these languages (section 133). Even in South Africa, which is basically a unitary State, English and Dutch are the official languages of the Union, and are treated on a footing of equality. All records, journals and proceedings of Parliament are kept in both the languages. All Bills, Acts, and notices of general public

importance or interest issued by the Union Government are in English and Dutch (article 137). According to the Official Languages of the Union Act, 1925, the word 'Dutch' includes *Afrikaans*.

22. A British Copy-Book Text

The constitutional provisions enumerated above leave little room for doubt as to the character of the political system inaugurated since January, 1950. Basically, it is not of the federal type, not being in conformity with the known and recognised federal norms except perhaps the Canadian pattern in form as well as in substance. Nevertheless, it has, as was previously remarked, certain federal elements such, for instance, as (1) the distribution of powers between the centre and certain categories (not all) of the units; (2) the justiciable nature of disputes arising out of the scheme of distribution.; and (3) the requirement of a special procedure for constitutional amendments. These, however, are controlled by a unitary steam-roller both as normal routine business and for emergency purposes.

The Government of India Act of 1935 sought, along Canadian lines, to set up some sort of a federal system "by creating autonomous units and combining them into a federation by one and the same Act". But 'the autonomous units' were not 'sovereign States', unlike the States of the American Union. The Constitution of 1950 has not disturbed the British Indian structure to any material extent either in the matter of distribution of territories or in respect of the allocation of powers. The only innovation it has introduced is the bringing into the Indian Union of the Indian States which exercised, subject to the Crown's paramountcy, limited sovereign powers in varying degrees from State to State throughout the entire British period.

There is a suggestion made by some commentators that while the Act of 1935 contemplated voluntary accession on the part of the Indian States, the present constitution has ruled it out. That is misleading. The voluntary nature of the accession was also formally recognised in the Act of 1935 as adapted under the Indian Independence Act

of 1947, and in the Instruments of Accession and in the other agreements that followed. The States acceded on that basis, and not in terms of the present constitution; and the Constituent Assembly proceeded to deal with such acceding States as well as with the British Indian provinces and territories, which had no option whatsoever. The question of accession, so far as the latter were concerned, did not arise at all.

With the withdrawal of the predominantly Muslim sectors in east and west the Indian Constituent Assembly persuaded themselves that a strong central authority was required alike for effective defence against external aggression and for internal security. So they took the Act of 1935 as their model, and then introduced certain consequential changes, and these together form the basis of the constitution they have given to the country in disregard of the warnings of history.

23. Nationalism in Certain Social Context as a Reactionary Force

You cannot realise your objectives, however good and noble, by putting certain words into your constitution. You must strive to achieve them by eliminating the causes that stand in the way of your succeeding in your endeavour. There is, I suggest, clear evidence of insistence on one nation idea not only in the preamble to our constitution, but also in the specific provisions themselves. 'Nation' is a social phenomenon, and the concept does not always and invariably release identical forces. The 'nation' idea was a liberalising force when in the Middle Ages it came to symbolise resistance against the myth of Churchianity and the repressive feudal economy. It is a creative force when it represents a movement for liberation from alien domination or from the tyranny and oppression of the metropolitan exploiters. On the other hand, it is a dangerous and reactionary force when it is used, by the deification of a mystic entity, to strengthen and consolidate imperialism or to supply to the indigenous instruments of exploitation their much-needed driving power.

Revolutions may take different lines in different phases of social relations. It may take the line of bourgeois revolt against monarchy and nobility; it may be a national revolt against foreign exploitation. It may be an agrarian revolt against landlords; it may be a proletarian revolt against a reactionary bourgeoisie, indigenous or alien. Sometimes all these different types of revolutions may be mixed up and may produce a general liberation movement. Into that movement may be imported the prejudices of different classes and their fantasies as well as their revolutionary impulses and urges.

Our national movement during the British regime was characterised by all these divergent emotions. That movement could not purge itself of its weaknesses when the time came for a shake-up during the closing months of the war. The dogmatic insistence on one-nation idea led to a series of terrible communal carnage, and eventually to the partition of the country on a religious basis; and it may produce conflicts of other types both in India and in Pakistan with consequences which one may not foresee at the present moment. There are signs of such conflicts in East Bengal's struggle for recognition of Bengali as one of the Pakistani State languages and, in the Indian belt, in the movement for redistribution of the territories of States on a linguistic and cultural basis. What do these conflicts signify? They prove that one-nation idea, which the Indian Constitution has sought to impose upon the people, or which, in a different context, the Pakistani Government at Karachi seem determined to foster among their people, does not correspond to the facts of the situation in either country.

24. A Deified Nation-State?

In the Western context India has never been, or is, a nation. The same holds good for Pakistan too. Peoples of these countries need not regret it. The nation-idea is now a reactionary force, and creates more problems than it solves. The word 'nation' is sometimes construed to mean a population of the same racial stock and language

inhabiting the same territory, and constituting a larger part of the whole population of a State, whereas nationality is one of several distinct ethnic groups scattered over the State's territory and embracing a comparatively small part thereof. In this sense we have no 'nation' either in India or in Pakistan. We have, on the other hand, a number of nationalities in both the countries. Within the country we are still known as Bengalees, Biharis, Gujratis, Mahrattis, Punjabis, Marwaris and so on, or from a different angle, as Hindus, Muslims, Christians, Buddhists and so on, whatever the law may say. Similarly, inside Pakistan they have Bengalees, Sindhis, Punjabis Baluchs, or from the communal angle, Hindus, Muslims, Christians. Buddhists and so on. Outside, of course, they may be known respectively as Indians and Pakistanis, but that is a matter more of form and law than of fact.

We are a multi-national people, and so are the Pakistanis. It is neither necessary nor desirable that we must assume the existence of a 'nation' where there is no 'nation' or that we must create fiction in a vain effort to obliterate fact. Among a multi-national people a purely unitary State tends to transform itself into a repressive and reactionary force. The best way to adjust their differences and to eliminate the causes, of distrust and conflict is to devise a mechanism which seeks to build national unity without prejudice to national self-determination. It may sound paradoxical, but it is of the essence of federalism among a multi-national people. Such a mechanism calls for redistribution of territories on the basis of language and culture, a clear demarcation of functions between the centre and the units on the principle of divided sovereignty and recognition of the right of secession on the part of the latter. It is a mechanism of social unity in national diversity.

In that setting a considerable measure of central control for the purposes of economic planning, social security and territorial integrity would command wide and

enthusiastic support. An effective deterrant against territorial disintegration is the full and unequivocal recognition of the right of secession because it eliminates the sense of fear and insecurity, of injustice and inequality. The Indian Constitution amounts to an emphatic repudiation of the basic principles of what I call multi-national federalism. India is neither a unitary State nor a federal State; it is, on the contrary, a deified nation-State in which the right of national self-determination is deemed a betrayal of the national faith.

CHAPTER X

OUR GOVERNMENT AT WORK

1. The Executive and Other Organs

From the idealistic exuberance of the preamble to our constitution as well as from its anti-climax in the shape of certain pallid recitals from the Government of India Act I should now pass on to an examination of the hard core of the administrative apparatus introduced since 1950. This leads to the question as to how the affairs of our country are administered, how our country is governed. To put the question in a different way, in what authority is what is known as the executive power vested at the Centre and in the States? What are the different instruments through which that power is exercised? How, again, are their mutual relations determined, and on what basis?

Broadly speaking, the word 'Government', as explained in Chapter I, includes the executive, the legislature and the judiciary. In a narrower sense, it means only the executive, although these various functions sometimes overlap, not by any means less in capitalist countries than under the socialist system. In our time such complex and difficult problems are emerging from day to day that it is found difficult to tackle them effectively without coordination and collaboration, and in the process power is concentrated in the executive. The result is that the other two organs tend to be reduced to the position of junior partners in the business of Government.

The word 'Government' is not defined in the constitution. According to the IPC, it denotes the Central Government or the Government of a State (section 17). This definition has been substituted by an Adaptation Order for the earlier one which stated that the word "denotes the person or persons authorised by law to administer executive government in any part of India". The original definition in the Code has, by the way, been retained in Pakistan. The expressions "The Government of India" and "The Government of a State" occur respectively in article 77

and in article 166 of our constitution, in connection with the conduct of business. It is clear, however, that the word 'Government' is used in these articles in a narrow sense. What is meant is the executive as distinguished from the legislature or the judiciary.

2. The Vesting of Executive Power and its Extent

The executive power of the Indian Union is vested in the President and shall be exercised by him either directly or through officers subordinate to him. The supreme command of the Union's defence forces is also vested in him, but the exercise of the command shall be regulated by law. The vesting of this two-fold power or of the two branches of the same supreme power must not be deemed to transfer to the President any functions conferred on the Government of any State or on any other authority. Nor does it prevent Parliament from conferring by law functions on authorities other than the President (article 53). Of course, the constitution provides that there shall be a President of India (article 52).

The executive power of the Union extends to (a) the matters with respect to which Parliament has power to make laws, and (b) the exercise of such rights, authority and jurisdiction as are exercisable by the Union Government by virtue of any treaty or agreement. This executive power, however, does not extend to matters in the Concurrent List in any Part A or Part B State, except where otherwise expressly provided for. Normally the executive power relating to those subjects is exercised by the States. It must be noted that the President's exercise of the Union's executive power is subject to the other provisions of the constitution (article 73).

3. The Council of Ministers with Prime Minister as Head

There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions (article 74). The President shall appoint the Prime Minister, and also the other Ministers on the latter's advice. The Ministers hold

office during the President's pleasure, but they shall be collectively responsible to the House of the People. A Minister, who, for any period of six consecutive months, is not a member of either House of Parliament, shall cease to be a Minister at the expiration of that period. Before a Minister enters upon his office the President shall administer to him two oaths, namely, (a) the oath of office, and (b) the oath of secrecy (article 75). The question whether any, and, if so, what advice was tendered by Ministers to the President shall not be enquired into in any court (article 74). The duty is cast upon the Prime Minister (a) to communicate to the President all decisions of the Council of Ministers relating to the administration of affairs of the Union and proposals for legislation; (b) to furnish such information as to those matters as the President may call for; and (c) should the President so require, to submit for the consideration of the Council of Ministers any matter on which a Minister has taken a decision but which has not been considered by the Council (article 78).

The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business. All executive action of the Union Government shall be expressed to be taken in the name of the President. An order or instrument made and executed in the name of the President and authenticated in accordance with the rules made by him shall not be called in question on the ground that it is not an order or instrument made or executed by him (article 77). *Mutatis mutandis* the same provisions apply to the administration of affairs of every Part A State and, with certain exceptions, to that of every Part B State (Part VI, Chapters I and II; and Part VII).

4. The Executive Set-up in States as Distinguished from the Union Set-up

The points of difference are briefly set forth. First, for the words 'The President', the words 'The Governor' shall be read in the case of every Part A State. Second,

while the President is elected to his office, the Governor is appointed by him and holds office during his pleasure (articles 155 and 156). But no person is eligible for appointment as the Governor unless he is a citizen of India and has completed the age of thirty-five years (article 157). These tests of eligibility apply to the office of President as well. Besides, no person is eligible for election as the President unless he is qualified for election as a member of the House of the People (article 58). The President holds office for a term of five years, and is eligible for re-election to that office. There is thus no limitation on terms. In the US, incidentally, no person can now be elected President for more than two terms, each term covering a period of four years (article XXII adopted in 1951). Both the President (article 60) and the Governor of every State (article 159) must, before entering upon office, make and subscribe to an oath or affirmation in the prescribed form. Third, the Governor, unlike the President, is required to exercise his functions in certain respects in his discretion. If, however, any question arises whether any matter is or is not a matter as respects which the Governor is required to act in his discretion, the decision taken by him in his discretion shall be final. The validity of any act done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion (article 163). Fourth, the head of the Council of Ministers of a State is called the 'Chief Minister', and not, as at the Centre, the 'Prime Minister'. The Chief Minister, however, generally plays in law and in fact the same role in the State as the Prime Minister does in the Union. Exception has been made in the case of Part B Staff of Jammu & Kashmir where the First Minister is called the 'Premier'. In the Dominions, incidentally, with the exception of Pakistan, the general practice is to call the federal First Minister the 'Prime Minister' and the First Minister of a State or Province the 'Premier'. The expressions 'Prime Minister' and 'Premier' are, however, used interchangeably to designate the head of the British Cabinet.

In the case of every Part B State the words 'The Rajpramukh' shall be read for the words 'The Governor' (Part VII). How the Rajpramukh comes to his office has been described in an earlier chapter. In the State of Jammu & Kashmir the hereditary rulership has been replaced, if in principle, by an elective office in accordance with an agreement concluded in July, 1952, between the Government of India and the State Government. The Sadar-e-Riasat—for that is the name of the office—is elected by the State Assembly, and recognised as such by the President.

The executive power of a State shall extend to the matters with respect to which the legislature of a State has power to make laws. A State legislature has power to legislate as to the entries of both the State and Concurrent Lists. But the State's executive power in regard to matters included in the Concurrent List is subject to, and limited by, the executive power expressly conferred by the constitution or by any parliamentary enactment on the Union or Union authorities (article 162).

5. The Procedure Relating to the Presidential Election

Before I proceed to investigate the nature and character of our system of government at the centre and in the units it seems desirable to examine the procedure in accordance with which the President is elected, and its implications. The President is not directly elected. In other words, our people do not elect him. He is elected by what is called an electoral college. That electoral college consists of (a) the elected members of both Houses of Parliament, and (b) the elected members of the Legislative Assemblies of the States (article 54). Two principles are to be followed in connection with the election of the President. First, as far as practicable, there shall be uniformity in the scale of representation of the different States. Secondly, there shall be parity between the States as a whole and the Union. This uniformity and this parity are determined with reference to the population, and not directly with reference to the number of voters.

For the purpose of applying these two principles a specific formula has been adopted by the constitution (article 55). The formula is this: Divide the total population of a State by the number of the elected members of its Assembly. Then divide the quotient by one thousand. The result thus obtained is the number of votes which every elected member of the Assembly is entitled to cast. Add one to the quotient if the remainder of the second division is five hundred or more. This applies to the elected members of every State Assembly. Now, multiply the number of votes of each elected member of the State Assembly by the number of elected members of the State Assembly. Add together the results of such multiplication for all the States. Thus you get the total number of the votes of the States. Divide this total by the number of the elected members of both Houses of Parliament. The quotient is the number of votes for each elected member of either House of Parliament in the Presidential election. Add one to the quotient if the fraction is one-half or more.

This method of choosing the President is one which is borrowed from Ireland (article 12). Under this method each elector is entitled to mark in the ballot paper his preferences for the candidates by marking 1, 2; 3, 4 and so on, according to the number of candidates and in the order of his preference. He may not give his second, third, fourth and other preferences. But his vote is not valid unless there is first preference. In other words, a ballot paper, which is not marked 1, is rejected. The 1-marked papers shall be counted first. Then the total number of such papers shall be divided by 2, and 1 shall be added to the quotient. The result thus obtained is called the quota. If any candidate obtains this quota, that is, an absolute majority of the first preference votes (the 1-marked papers), then he is declared elected.

If, however, the quota is not obtained by any candidate, then there is a second count. At this count the candidate, who has got the lowest number of the first preference votes, is eliminated. Then the second preferences marked in his

ballot papers are distributed among the other candidates for whom such preferences have been recorded by the electors. This process of elimination, counting of the preferences and their distribution, goes on until some candidate or other is left with an absolute majority of the votes polled. Such a candidate is then declared elected. The voting at the election shall, of course, be by secret ballot.

This method is described in our constitution, on Irish analogy, as "proportional representation by means of the single transferable vote". What is commonly known as that method is, however, different. The latter method presupposes a plural-member constituency. There is provision in our constitution for this method also, for example, in connection with the election of members of the Council of States or of a State Council by members of the State Assemblies [articles 80 (4) and 171 (d) (4)].

The procedure whereby the President of India is elected excludes the possibility of a person being elected to that office by a minority vote. That, to my mind, is the only merit of the system from the popular, democratic point of view. It is nonetheless vitiated by one or two serious defects. For one thing, it is not proper to employ in one constitutional document the same phrase to convey different meanings, as has been done in our constitution with reference to the expression "proportional representation by means of the single transferable vote". In connection with the election of the President it contemplates a procedure which is different from what is intended in other contexts.

This has given rise to confusion among large sections of our people. It may one day produce unnecessary and vexatious disputes, not necessarily within the forum of a court. For instance, it may be reasonably contended that in the absence of any express provisions to the contrary the Constituent Assembly or the framers of the constitution must be presumed to have intended that the same phrase did not mean one thing in one context and quite another thing in a different context. If its usual meaning holds, then the meaning given to the phrase in connection with the Presidential election falls to the ground. Conversely,

if the formula adopted for the Presidential election is what was contemplated by the Constituent Assembly, then the normal procedure is not in order.

Members of the Constituent Assembly must be presumed to be sensible persons, and sensible persons must be presumed, as a normal rule, to have intended that the same word or phrase must convey the same meaning and that, where there was inconsistency, the usually accepted meaning must have it. At least to avoid confusion, the Constituent Assembly might have called the procedure, whereby the President is elected, "proportional representation by the alternative vote", and not "proportional representation by means of the single transferable vote. This latter procedure has been exhaustively dealt with in the author's book entitled *Revolution by Consent ?* (Chapter II).

6. The Swiss or USSR Analogy not Pertinent

For another, the vesting of the power to elect the President in an electoral college composed exclusively of legislators, though elected, is undemocratic in that the people have no voice in the matter except in a distant and indirect way. In answer to this contention it may, however, be pointed out that almost the same principle is followed in the Swiss Confederation and in the USSR. But these countries which represent two different systems of government. In Switzerland the supreme directing and executive power of the Confederation is exercised by a federal Council composed of seven members (article 95). Members of that Council (Executive) are appointed for four years by the two Houses of that Federal Legislature in joint session. They are chosen from all Swiss citizens eligible for membership of the Lower Chamber—the National Council. Not more than one member from each Canton may be chosen for the Federal Council. The membership of the council is renewed after every general election of the National Council (article 96). The President of the Confederation is nominated for one year by the Federal Assembly (the Federal Legislature) from amongst the seven members of the Federal Executive. He presides over the Federal Council (article 98). Thus

the Swiss President has no powers of direction, superintendence and control. Consequently, this Swiss analogy is not pertinent to the legal and constitutional position of the President of India upon whom enormous powers have been conferred by the constitution.

Equally inappropriate is the USSR analogy in this context. The entire basis of the Soviet State is different from that of our own State and, for that matter, from that of any western democracy. The highest organ of the State authority is the Supreme Soviet of the USSR, consisting of two Chambers: (I) the Soviet of the Union, and (II) the Soviet of the Nationalities (articles 30 and 33). At a joint sitting of both the Chambers the Supreme Soviet elects the Presidium, consisting of a President, sixteen Vice-Presidents representing sixteen Union Republics, a Secretary and fifteen members. For all its activities the Presidium is accountable to the Supreme Soviet (article 48). All State power is concentrated in the latter body composed of persons elected for a four-year term but subject to recall by the electorate (articles 36 and 142). No executive or judiciary can veto the laws enacted by it or declare them invalid and unconstitutional. Appeal from its legislation lies only to the people on the basis of referendum which may be made by the Presidium on its own initiative, or on the demand of any one of the Union Republics (article 49).

The Union Supreme Soviet, at a joint sitting of both the Chambers, appoints the Government of the Union, namely, the Council of Ministers of the Union, supervises their work and may overthrow them at will (articles 56, 64, 65, and 70). In the intervals between the sessions of the Supreme Soviet the Council is responsible to the Presidium. The Union Supreme Soviet also elects the Supreme Court and the special courts of the Union for a term of five years (article 105). The functions of the Supreme Court are very much restricted. They do not correspond to the functions of the Supreme Court of India, far less to those of the US Supreme Court. In any even, it has no power to investigate and pronounce upon

the validity or otherwise of any law passed in the exercise of its exclusive power by the Supreme Soviet of the Union. The power of the State belongs to the workers and peasants. The instrument of that power is the Supreme Soviet, whose members may be recalled, and whose decisions may be annulled, only by the people. It is clear that the President of the USSR is only the Chairman of the Presidium and is intended, in no way, to exercise functions analogous to those assigned to the President of India.

7. The US Procedure Relating to Presidential Election

I should now say a few words, by way of contrast, about the office of the US President. The President is elected indirectly. In other words, he is not put upon his great job in the White House by the direct votes of the people. The voters in each of the forty-eight States elect certain persons in the month of November immediately before the expiration of the four-year term. These persons form the electoral college and actually vote for the President. The qualifications of the original voters, who elect the members of the electoral college, are determined by the law of each State, and vary from State to State. It means that every adult person in each State does not necessarily enjoy the franchise, irrespective of the test based on residence, domicile, educational competence, colour or race. The number of members of the electoral college assigned to each State is equal to the total number of its Senators and Representatives in the Congress. Thus all the States have not the same number of members in the electoral college. The total number of members of the electoral college is 531, corresponding to the total number of the Senators (96) and Representatives (435) of all the forty-eight States. In December those 531 persons meet in their respective capitals to cast votes for President and Vice-President. The votes thus cast are counted in the House of Representatives in Washington during the first week of January of the following year. The duly elected President is sworn to office on January 20, and so is the Vice-President. Although the votes cast by the members

of the electoral college are counted in January, seldom do the American people go to bed on the night of the primary elections by the States in November without knowing Who their next President and Vice-President would be. The reason is that the party composition of the electoral college, which is elected in November, gives a clear and definite indication as to the choice of the primary voters. They must have voted for this party or that party, and the party that obtains the majority of the members of the electoral college wins. Naturally the candidate set up by that party becomes the President in fact, though not in law, even before the votes of the electoral college are counted in the first week of January. Hence one reads in newspapers of congratulations being offered by the defeated candidate to his successful rival in November either on the night of the primary elections or on the following day. The fact, however, is that it yet remains for him to be formally elected and installed in office in January.

Sometimes one hears of a 'minority' candidate being elected President of the US. What is meant is this : Whichever candidate obtains a majority within a State gets all the seats of the electoral college assigned to that State. Thus if one candidate polls, say, 1,000,010, primary votes in a State and the other one gets 1,000,000, the first one gets all the electoral votes of the State, say 24, to the total exclusion of the second candidate. In another State the first candidate polls 100,000 primary votes and the second candidate polls 500,000. The latter obtains all the electoral votes of that States, say 12. The first candidate, as you see, has polled 1,100,010 primary votes ($1,000,010 + 100,000$), whereas the second candidate's voting strength in the primaries comes to 1,500,000 ($1,000,000 + 500,000$). Thus with a minority of the primary votes the first candidate secures the majority of the electoral votes. He gets 24 votes of the electoral college as against his rival's 12 votes. This may happen, and has actually happened in more than one Presidential election. In 1912 Woodrow Wilson polled less popular or primary votes than his two opponents combined, but was elected by a majority of the votes of

the electoral college. Now, the Vice-President of India is elected by the members of both Houses of Parliament assembled at a joint meeting, but the system followed is one of proportional representation by means of the single transferable vote—the same as is applied for the Presidential election (article 66). The Vice-President of India, like his US Counterpart, is, however, the *ex-officio* Chairman of the Second Chamber of the Federal Legislature, and presides over its meetings (article 89). It should be noted that no person other than a natural-born citizen of the USA is eligible for the office of the President. That is easily explained, but it is not a sufficient test of eligibility. In addition, he must have attained to the age of thirty-five years, and been fourteen years a resident within the United States [article II, (4)]. The same tests of eligibility apply to the office of the Vice-President. It is provided that no person constitutionally ineligible for the office of the President, shall be eligible for that of the Vice-President (article XII).

8. Difference Between Presidential and Cabinet Types

They have President in France but they have, more or less, a parliamentary system of government. They have President in Ireland and there, too, they have parliamentary government. In Switzerland they have President, but the type of government they have evolved is neither parliamentary nor presidential. In the USSR they have President and there, too, it is neither a parliamentary nor a presidential type of government that is in vogue. It is the socialist Soviet government that they have in the USSR and in the Union Republics. It follows, therefore, that the fact of the head of a State being an elected President does not necessarily mean that it is a presidential form of government *de facto* or *de jure*.

Three questions arise in this connection. What, in the first place, is parliamentary government? How and on what basis, in the second place, is parliamentary form of government distinguished from the presidential form? Is or is not the Government of the Indian Union or that of

a constituent State, in the third place, a parliamentary form of government? England is the original home of parliamentary or Cabinet system of government, and in the Dominions, generally, they have adopted, with minor changes here and there, the basic principles of that system of government. These principles rest partly on laws and partly on conventions.

There should be no mistake about one very important matter. It is not true, as some people hold in respect of the origin of the State, that the idea of the Cabinet government had come first, and that subsequently the fact of such government emerged in accordance with that idea. There was in this respect, as in other respects concerning the other affairs of mankind, no primacy of the idea. The idea which embodies the principles, on the contrary, owes its origin to the phenomena of social change or to the facts of a given situation. Take England. How did the Cabinet system develop in that island State? The accession to the English throne of George I marked the beginning of the Cabinet government. It came in the wake of the Revolution of 1688. The King was forced to place his confidence in the leaders of the party that secured his accession. He soon ceased to preside at the Cabinet meetings. The place hitherto occupied by the King was taken by a Minister who became the First Minister of the Crown subsequently described as the Prime Minister, or the Premier.

A brief reference of the Privy Council seems essential to an understanding of the British Cabinet system of government. Members of the Cabinet are "Her Majesty's Servants", whereas members of the Privy Council are "the Lords and others of Her Majesty's Most Honourable Privy Council". The Cabinet as such is a deliberative body, whereas the Privy Council, is essentially an executive body. The policy of the State is settled by the Cabinet but is carried out by Orders in Council or by action taken by the various departments. What the Cabinet does is to aid and advise the Crown in the exercise of its functions. Its members are heads of departments and also leaders of the

party whom the electorate have voted to power. The Cabinet is distinct from the Privy Council not only in title but in function as well. There is, nevertheless, a connecting link between the Privy Council and the Cabinet inasmuch as members of the Cabinet are sworn in as Privy Councillors. Every Cabinet Minister is a Privy Councillor, but not *vice versa*.

The executive functions of the Privy Council are now, for all practical purposes, of a formal character. These functions extend to giving effect to orders issued or made by the departments of the Government. The Privy Council is no longer an advisory council of the Crown; that place has been taken by the Cabinet. The Council meets for the purpose of authenticating orders of the executive or issuing proclamations. One or two advisory functions are still exercised by that body. There is, for instance, the Channel Island Committee. Committees of the Council are appointed from time to time for various purposes. There is, besides, the Judicial Committee of the Council, which exercises appellate or other judicial functions by advising the Crown. It hears judicial appeals in colonial cases and answers references apart from purely judicial appeals. All these functions are advisory. No decisions are given by the Committees, but only recommendations are made to the Crown.

While the Cabinet is summoned by the Prime Minister, the Council is convened by the Clerk of the Council. The term 'Cabinet' was first used to signify the 'inner committees' of the Council, deriving the name from the room where they were held. At present there are three classes of members of the Privy Council, namely, (1) all Cabinet Ministers sworn to the oath or affirmation of office, and of secrecy as Privy Councillors; (2) holders of certain high non-political offices such as Archbishops and Lords Justice of Appeal; and (3) some British subjects distinguished by reason of their public service and recognised as such by the Crown by the conferment of honours. The Cabinet is not recognised by law; it rests essentially on convention.

9. Conventions of the Constitution-a Double-entry Book-keeping

That every Privy Councillor must take the oath or make affirmation is a matter of law. That every Cabinet Minister is sworn in as a Privy Councillor is a matter of convention. By law the Ministers are appointed by the Crown and hold office during its pleasure. By convention Ministers resign from office when they are defeated in the Commons on what they consider issues of confidence or when a direct motion of censure or no-confidence is passed against them in the Commons. The law requires that the Government of the country must be carried on in the name, and under the authority, of the Crown. The convention demands that the Crown does not act other-wise than in accordance with the advice tendered by the Cabinet. It is not necessary to multiply instances. Where the law prescribes a particular procedure, the convention may evolve an entirely different norm or nullify the law in practice. Sometimes, again, one supplements the other. The whole thing is, as it were, a sort of constitutional double-entry book-keeping.

The convention, of course, presupposes the law, although at times the two may vary. Again, it owes its origin to the law or grows up around the principles of a written constitution. But once established, it may form the basis of a new law superseding, in form or in content, the pre-existing law. Conventions are understandings, habits, or practices which, though they may determine the relations between different organs of the State or between the State and its employees on the one hand and the citizens on the other, are not, in reality, laws at all since they are not justiciable. Conventions may, therefore' be grouped, roughly speaking, into two classes, namely, (1) long-standing customs and practices which for their duration have acquired some sanctity, and (2) understandings among the governing parties, old or new, which as rules of political behaviour are respected and adhered to.

When scholars or the lay public speak of conventions in connection with the Indian Constitution they use the

expression loosely or do not simply know what they speak about. For, there can be no question of long-standing customs having grown up around or upon the principles of our constitution which is of comparatively recent origin. Nor are there understandings among the people or among parties which reflect the greatest measure of agreement as to the constitutional norms. In Britain the Revolution of 1688 transferred the directing power of the State from the Monarch to Parliament. But Soon the Crown's advisers acquired Powers of initiative, direction and control, and these advisers constituted, as I have shown, what came to be known as the Cabinet. The Cabinet became the directing Power of the State. This has not Come about in Consequence of any legal formula ; it rests on conventions. Wade and Phillips say that today Parliament does not in practice so much govern as regulate the executive, which at the top is the Cabinet. That is not Correct. Parliament in our time does not, in practice, even regulate the executive. On the contrary, the executive, through the Cabinet, controls and regulates Parliament in fact, though not in law.

10. The Basic Principles of Cabinet Government

We may now deduce certain principles of Cabinet government as it has evolved in Britain and been adopted in the Dominions. First, the King can do no wrong. It flows from the principle of perfection of which the King is the symbol. The principle of perfection, to a certain extent, is embodied in the Indian Constitution in so far as it gives immunity to the President, Governors and Rajpramukhs of States (article 361). The President may, however, be removed from office by impeachment for Violation of the constitution in accordance with a prescribed procedure (article 61), The President may dismiss or remove a Governor or Rajpramukh at any time. The formula that the King can do no wrong has acquired different meanings, but what we are concerned with in the present context is that the Ministers, and not the King, are responsible for the policy of the

State and the acts done in pursuance of that policy. From this has emerged the practice that the King acts on the advice of his Ministers, keeping in the background his own personal reactions to such advice or giving the impression that he has no opinion at all. This is not a legal formula but, as Dicey has put it, is a convention of the constitution.

Second, the Cabinet must command the majority in the House of Commons and win its confidence. What is meant is that the majority of seats in the Commons must be under its control and members subject to its directives. It may or may not mean, under the present system of representation, the majority of votes cast in the general election. Members of the Cabinet must be members of either House of Parliament. There is nothing in law preventing a member of the House of Lords being commissioned as the Prime Minister, but the fact is that since 1902 no peer has held that office in Britain, the last being Lord Salisbury. The appointment of Mr. Baldwin in 1923 in preference to Lord Curzon, who apparently had better claims to that office, is interpreted as marking a convention excluding a peer from the office of the Prime Minister. Some of these conventions are enacted as law in Ireland, for instance, the duty of a Ministry to resign from office on its ceasing to win the confidence of the Dail (article 53), and the rule that Ministers must be members of the Dail (article 54). The Indian Constitution, too, lays down, as earlier shown, that Ministers, except for a temporary period of six months, shall be members of either House of the Legislature, and that at the head of the Ministry there shall be a Prime Minister at the Centre or a Chief Minister in the State.

Third, the leader of the majority party in the Lower House is chosen as the Prime Minister, on whose advice other Ministers are appointed. All the Ministers in Britain are not of Cabinet rank. The number of those who are admitted to that rank varies from time to time according to the pressure and importance of business, but as 'a rule it is in the neighbourhood of twenty to twenty-four. The

major questions of policy are decided by the Cabinet to which normally Ministers without Cabinet rank have no access. In our country this distinction has been made on the basis of status, rank and functions. There are Cabinet Ministers, Ministers of State and Deputy Ministers. In exceptional circumstances such as war or any other national emergency a Coalition Ministry is formed with representatives of different parties. In Britain the office of the Prime Minister is unknown to the positive law, though there are indirect references to it in statutes or informal declarations as in the Chequers Estate Act, 1917, and the Salaries Act, 1937, and in the Royal Warrant of Precedence. In our country and in the Republic of Ireland (article 28) the office is formally recognised in law.

Fourth, the political responsibility of the Cabinet is collective. The advice tendered to the King by the Cabinet is unanimous even though members may happen to hold different views on a given issue. At present the decisive factor is the opinion of the Prime Minister, and the Ministers who are unable to reconcile themselves to the Prime Minister's view resign or are forced to resign. The Prime Minister is today the pivot of the ministerial team, and not merely a *primes inter Pares*. But much depends on his personality, particularly on the confidence he may inspire among members of the legislature and the public. Salisbury's Government of 1882 was not affected by Lord Randolph Churchill's retirement. Lloyd George's Government was not at all shaken by the forced resignation of Montagu in 1922. There were resignations of H. Samuel, Sinclair and Snowden from the MacDonald Cabinet in 1932, without serious loss of its authority, though not of prestige. The more intense the capitalist contradictions, the greater the concentration of power in the Cabinet to the exclusion of Parliament. And the concentrated power of the Cabinet passes rapidly into the hands of the Prime Minister.

This doctrine of collective or joint responsibility, which is enacted as law in India and in the Republic of

Ireland (article 28), has another implication. It means that the action of the Cabinet is the action of each member and that for the action of each member the Cabinet is responsible as a whole. If a motion of censure is passed against a particular Minister, then the whole Cabinet generally goes, the presumption being that the official action of the Minister concerned had the support of the Cabinet. An illustration of this theory is given by Sir S. Low and referred to in Anson's *Law and Custom of the Constitution*. An amendment to the King's address was moved in 1902, censuring the conduct of the Post-Master General's Department in connection with a certain deal. It was sponsored by several members of the ministerial party. They were told that if they carried the amendment, the Government as a whole would treat it as an issue of confidence and resign. The amendment was consequently lost, the sponsors having refrained from supporting it on division.

There are, however, exceptions to this rule. Sometimes a Minister may save his colleagues by voluntary resignation of office. Sometimes a Minister may initiate some important action without reference to his colleagues, for which the latter may refuse to take any responsibility. In such a case the Minister resigns. An apt example of this procedure is furnished by Montagu's resignation from the British Cabinet in 1922, on account of his publication of the Government of India's views on relations with Turkey without reference to his colleagues, to which Curzon took serious exception, Montagu had to go.

11. The US System in Action

Now, the US illustrates the presidential system of government in its typical and most developed form. It rests, at least in theory, on the doctrine of the separation of powers. The constitution has made a strict division of powers, classifying them as executive, legislative and judicial, and entrusting the exercise of each of these powers to each of the three separate instruments created for the

purpose. It is supposed that this feature was copied from the British pattern of government. That this supposition is wrong and baseless will be clear from the language in which the distribution of powers has been couched, and also from the mode, method and manner of the working of the system.

The executive power of the US is vested in the President, and in no other agency (article II). All legislative powers granted to the centre are vested in the Congress, consisting of the Senate and the House of Representatives (article I). The Senate is a House of 96 members, two from each State, and one-third of its members is elected every two years. The House of Representatives, which consists of 435 members, is elected for a two-year term. The judicial power of the Union is vested in one Supreme Court, and in such other interior courts (federal) as the Congress may from time to time ordain and establish. The judges hold office during good behaviour (article III). In no other constitution is the division of powers made exactly in this manner, this exclusive vesting of powers in three different organs of the State.

About a dozen officers—just a little less in number—are appointed by the President subject to the approval of the Senate [article II (2)]. They constitute his Council of Advisers sometimes called his Cabinet. By an Act of the Congress, 1886, these officers may succeed to the presidency in the event of the removal, death, resignation, or disability of both the President and the Vice-President. For similar reasons the Vice-President steps into the office of the President and continues in office until a new President is elected in the normal course. The President, the Vice-President, and all civil officers of the United States may be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours (article II). The President is not a member of the Congress, or even a part of the legislature. Nor so is the Vice-President, although he is *ex-officio* President of the Senate and presides at its meetings, but he has no vote except in the case of a tie (article I). Members of the President's

Cabinet are likewise excluded from the membership of the Congress. They hold office during the President's pleasure. The President is the Commander-in-Chief of the armed forces of the United States, and of the militia of the several States, when called into service of the Union. He can make treaties with the advice and consent of the Senate, but the concurrence of two-third of the Senators present is necessary. With the advice and consent, again, of the Senate he appoints ambassadors, other public ministers and consuls and judges of the Supreme Court. To such appointments a bare majority support of the Senators present is adequate and decisive.

From time to time the President is required to give to the Congress information of the State of the Union, and may recommend to their consideration such measures as he may deem necessary and expedient, and may, on extra-ordinary occasions, convene both Houses of the Congress (article II). Every Bill passed by the Congress goes to the President for his signature before it becomes law. He may give or withhold his signature. Should he decide to withhold it, he must return the Bill, with his objections, to the House wherein it originated. The Bill is then given further consideration by the House, and if, after reconsideration, it is passed by two-thirds of that House, it is forwarded to the other House, together with the objections. It must be likewise reconsidered by this House, and if, after reconsideration, it is approved by two-thirds of the House, the Bill becomes law. Thus the President can veto legislation enacted by the Congress, but his veto may be nullified by two-thirds of each House of the Congress.

In the event of conflict between the President and the Senate over treaties or appointments the constitution leaves the tenure of the President or the term of the Senate absolutely undisturbed. The President cannot dissolve the Senate, nor can he, unlike the British Crown on ministerial advice, change the composition or the numerical strength of the Senate. Neither, again, can the Congress unseat the President (except by impeachment), or remove the members of his Cabinet. The power to remove the

President by impeachment is not generally used. Of course, it constitutes a reserve weapon for use against a President whom it may be difficult, for grave reasons, to tolerate. President Johnson was impeached in 1867, but was not convicted. Impeachment is also resorted to for removing Governors of States. As an alternative to impeachment, Governors may be removed by recall. There is provision for this procedure in twelve States. The consequences of a possible conflict between the President and the Congress over Bills passed by the Congress, vetoed by the President and again repassed by a two-thirds majority in each House are the same. There is no shaking at all of the constitutional mechanism.

In Britain the Cabinet takes the responsibility for the Bills passed by Parliament. In fact, no Bills can go through except with their support. The Monarch gives his assent to the Bills on the advice of his Cabinet. Today no British Monarch would dare disregard the advice tendered by his Ministers without a grave risk to the throne. Again, no British Parliament today would ordinarily refuse to pass a Bill sponsored or recommended by the Cabinet without exposing the Commons to the risk of a dissolution. Should, however, the Opposition Party in the Commons gain strength by ministerial party defections or for other reasons and successfully divide the House on a Bill, which the Cabinet consider vital to their declared policy, the Cabinet either resign, making room for the Opposition, or obtain dissolution of the Commons from the Crown. Thus a constitutional pattern has been evolved in Britain, which renders the working of the system a smooth and almost an automatic process. The US system is different, and this is one of several other features that mark the parliamentary form of government from the presidential form.

12. Coordination between Executive and Legislature in US through Committees

Neither the President, nor his advisers are responsible to the Congress. The Congress, unlike Parliament, again, is in no way subject to the control of the President or his

Cabinet. This is separation of powers in action. It would, however, be a mistake to think that in the US the executive and the legislature work independently, that they are isolated from each other. The current from the central power-house, which is the dominant class, runs equally through all the departments. Laws and political decisions are the manifestations of this current. They have evolved a law-making procedure through committees. About ninety per cent of all the work of the Congress on legislative matters is carried on in these Committees. Bills recommended by Congressional Committees generally become laws, and both the substantive and procedural provisions of the laws are mostly determined by them.

The parties decide on the composition of the Committees. The chairmanship as well as the majority on each Committee go to the majority party. In 1946, for instance, the Congress had 81 Committees with 48 for the House of Representatives and 33 for the Senate. The executive have no place in these Committees, but generally the President and his Ministers sponsor measures with the consent of the majority leadership in the Congress. In modern times it is exceedingly difficult for an individual member of the Congress to get an important Bill through unless it is taken up by the Administration. This shows how the American system tends, without any change in the constitutional set-up, to assimilate and absorb the British procedure in regard to legislation.

In accordance with the established procedure the appropriate Minister or Bureau Chief speaks to the Chairman of a Congressional Committee, drawing his attention to the necessity and urgency of an amendment to an existing law, or of new supplementary legislation. If the Committee Chairman agrees—and in most cases he agrees—then the draft is made by the relevant department or by a departmental committee on legislation. The draft goes to the Congressional Committee and is discussed and, if necessary, revised. A public hearing may be held when the Bill is introduced, and further changes may be made. The Bill thus discussed and amended or revised is referred

to as an Administration measure. Although all the legislative powers are vested in the Congress, it is clear that a large proportion of the Congressional legislation originates in or with the Administration.

Besides, on British analogy, the Administration initiates subordinate or ancillary legislation in the form of orders and rules which, as in Britain and in many other countries, constitutes the bulk of the entire legislative output. Here, too, the line of demarcation between the British and American systems—parliamentary and presidential—is becoming thinner and thinner in consequence of the increasing need for coordination between the executive and the legislature. It is a sign also of the concentration of power in the hands of the executive, which has been necessitated by the fast developing crisis of capitalism. By the impact of events the doctrine of separation of powers is giving way.

The call of the maturing crisis places a large measure of initiative in legislation, if through dubious processes, in the executive and its various departments. The executive initiative in legislation, their occasional appearances before the legislature to acquaint the latter with their needs and requirements, joint meetings of the executive and the legislature on subjects of legislation and its form and content and the sponsoring of financial measures by the executive—these are some of the developments within the American constitutional framework, which, are, in fact, adaptations of the British system of parliamentary government. Nevertheless certain fundamental differences exist, and to these reference has already been made.

13. The Indian System Corresponds Pattern to the British

The system introduced in India under the Constitution of 1950 follows, in the main, the British rather than the US pattern, even though we have at the head an elected President, and in the States Governors appointed by the President, or Rajpramukhs recognised as such by him. Our

President, like his American counterpart, has a fixed term of office. Like the latter, too, he is elected by an electoral college and continues in office for the term irrespective of differences, however great, between him and Parliament. The Ministers, including the Prime Minister, are appointed by him, and hold office during his pleasure. But in so far as the Ministers must have seats in Parliament and hold themselves collectively responsible to the House of the People the Cabinet is, in theory, the creature of the legislature. Every Minister must be appointed on the advice of the Prime Minister. The Cabinet goes out of office should it fail to command the support of the House on important issues of policy, and the President appoints a new Prime Minister and, on his advice, other Ministers.

As a general rule, all legislative measures, including proposals relating to taxation are introduced by the Cabinet. These correspond to the law and custom of the British parliamentary government. Consequently, our system may be called the Cabinet type of government or responsible parliamentary government. There is no such responsibility attaching to the President and his Cabinet in the US. Nor is such close and intimate cooperation contemplated, under the US Constitution, between the executive and the legislature, as is essential in parliamentary government. With certain exceptions, the same system as is applicable to our Centre is envisaged for our States.

14. Ministers in Relation to the President or Governors and Rajpramukhs

Certain questions may now arise : Is it permissible for the President of the Indian Union to act otherwise than in accordance with the advice tendered by his Ministers ? Is the advice of the Ministers, in other words, binding upon the President ? Are the relations between the Governor or Rajpramukhs and their Ministers intended to correspond to those between the President and his Ministers ? As I have said in different contexts, the Constituent Assembly has drawn liberally upon the

provisions of the Government of India Act, 1935, in framing our present constitution. Consequently, that Act and its working will throw light on some aspects of the issues raised. In that Act two expressions were deliberately inserted with reference to the functions of the Governor-General and of the Governor. As the federal part was not put into operation, an examination of the Governor's role *vis a vis* his Ministers would be pertinent in interpreting the present constitution.

So far as the Governor was concerned, the executive authority of the province was divided into two parts. In regard to the first part, the Governor was required to act 'in his discretion'. In regard to the second part, it was intended that he would act on the advice of his Ministers except in matters where he was required to exercise his functions 'in his individual judgment'. These, then, were the two expressions referred to above, namely, 'in his discretion' and 'in the exercise of his individual judgment'. The meanings of these expressions were explained in the course of the debates in Parliament and also in Paragraph IX of the Instrument of Instructions issued by the King to the Governor. Where the Governor, it was pointed out, was required to act 'in his discretion' the Ministers did not come into the picture at all. Where he was required to act 'in the exercise of his individual judgment' the Governor had to take into consultation his Ministers but could accept or reject their advice. In other respects, the Governor was required not only to consult the Ministers but also to act in accordance with the advice tendered by them.

These interpretations, be it noted, were not enacted as law, and not enforceable in any court. They constituted what I call a political guide to executive or administrative action. It was laid down that "the validity of anything done by the Governor of a Province shall not be called in question on the ground that it was done otherwise than in accordance with any Instrument of Instructions issued to him" (section 53). In interpreting these phrases I wrote as follows :

The 'mandatory' effect of Ministerial advice in certain matters as stressed in the Instrument is to be interpreted constitutionally, and not from the point of view of strict law 'There is legally no remedy against a Governor should he refuse to act upon the advice of his Ministers. Besides, he has the right to dismiss his Ministers in his discretion (sections 10 and 51), and the legal immunity is extended to him, whether in a personal capacity or otherwise (section 306). Express references to the remedies must be made in the Constitution Act if they are to be made available in enforcing constitutional principles. Read decisions in *Attorney-General for New South Wales v Trethowan and others* and in *Rex v The Governor of South Australia*. The Instrument only indicates the manner in which the Governor should behave constitutionally in relation to his Ministers, it does not lay down a legal formula (*The Problem, of Minorities*, p. 514).

To the view I ventured to take in 1935, when the Government of India Act was passed, I still adhere. Nothing has happened since to justify or warrant a revision of that view. In order that no confusion may arise as to the functions of the President in relation to his Ministers in a country where the conventions of parliamentary government have not fully developed, the framers of the Irish Constitution, for instance, have enacted certain principles into positive law. The Irish President is required by the constitution (a) to appoint the Prime Minister on the nomination of the Dail Eireann; (b) to appoint the other members of the Government on the nomination of the Prime Minister and with the approval of the Dail ; (c) to terminate the appointment of any member of the Government on the advice of the Prime Minister; and (d) to summon and dissolve the Dail on the advice of the Prime Minister, who has not ceased to retain the support of a majority in the House. He may refuse a dissolution to a Prime Minister who has forfeited the confidence of the majority of the members of the Dail (article 13).

15. British Conventions and Their Limitations in Indian Context

The conventions of the British Constitution may have their value; indeed they have. They may be cited as examples which it may be convenient 'and proper to

follow; indeed they are cited on occasion, not only in the older Dominions but in Pakistan and in India as well. But they have no legal force. Conventions cannot be grafted on alien soil. If they are, they simply die away unsung, unhonoured and unwept. They grow from within and by the interaction of social forces. So it is a misconception that in Pakistan or in India all the British conventions have the constitutional validity as they have in the country of their origin or among peoples who have, long been bred in the British political traditions.

If the English King or Queen gives a dissolution to a defeated Prime Minister, it does not necessarily follow that the Indian President is bound to act likewise. If the English King or Queen refrains from dismissing his or her Ministers, we must not presume therefrom that the same convention binds our President. Examples may be multiplied. I am not suggesting that the President should act in disregard of the conventions of parliamentary government. What I contend is that due note should be taken of the constitutional provisions, of the differences in the background, and of the political and social forces that, in the last analysis, determine the form of an institutional structure, and give it its Content.

Sometimes a President by his democratic appeal may command greater respect and support from the people than a Prime Minister and his colleagues. Conversely, a Prime Minister and his colleagues may very often reflect public opinion more accurately than a President. Sometimes, again, individual Ministers may be more popular than the Prime Minister who might have lost, for some reason or other, the confidence of the people, let alone those occasions when all these—the President, the Prime Minister and other Ministers—may have forfeited public confidence or support. In such circumstances conflicts may arise, and reliance on the conventions of the British Constitution in this setting may not prove helpful in resolving these conflicts.

One must not make any confusion between the hereditary British monarchy and the heads of States,

elected or appointed, say, the elected President of India or the appointed Governor-General of Pakistan. The English monarchy has large and extensive functions, though mostly ceremonial, for internal purposes. What is no less important, it is used as a mystic symbol of unity linking the different parts of the Commonwealth and Empire. Considerations of expediency, therefore, demand that it must not be involved in internal party strifes or in possible intra-Commonwealth conflicts. An atmosphere of immaculate perfection and of social and political ubiquitousness surrounds the throne-an atmosphere which has been created over the centuries and sedulously fostered and nursed even in our time. No such symbolic significance attaches to the office of the Indian President or of the Pakistani Governor-General ; and naturally enough parliamentary conventions bereft of the monarchy, their sustaining force, cannot but lose much of their significance in the context of India or of Pakistan.

16. The Pakistan Episode of 1953

The events in Pakistan, which occurred in April, 1953, confirm this theory and lend support to the interpretation I put on the functions of the Governor *vis a vis* his Ministers in terms of the Government of India Act, 1935. On the 17th April. Governor-General Ghulam Mohammed called Prime Minister Nazimuddin and the other members of his Cabinet to his residence at Karachi. They met him. The Governor-General demanded the resignation of the Cabinet. The Prime Minister in reply stated that the Governor-General, being a purely constitutional head, had no right legally and constitutionally to make such a demand. He added that he commanded the confidence of the Legislative Assembly and the country and was, therefore, entitled to remain in office. The fact that the Assembly had passed his budget by an overwhelming majority only recently was a clear proof, it was contended, that he had the Assembly and the country behind him.

The Prime Minister told the Governor-General that the Government of India Act as adapted under the Indian

Independence Act, 1947, unlike its original version, gave the latter no power to act "in his discretion" or "in the exercise of his individual judgment" (section 9), and that, consequently, the Governor-General could not force the Cabinet out of office at his own sweet will. The Prime Minister took the line that till such time as he himself rendered the resignation of the Cabinet, or the Assembly, to which the Cabinet was responsible, expressed its lack of confidence in the Cabinet, he and his colleagues were legally in office.

The Governor-General was not impressed by these arguments, and he dismissed the Prime Minister and his colleagues and commissioned Mr. Mahommed Ali to aid and advise him in the formation of a new Council of Ministers. For justification of his action the Governor-General relied upon section 10, which provides: "The Governor-General's Ministers shall be chosen and summoned by him, shall be sworn as members of the Council, and shall hold office during his pleasure". To the Governor-General, it 'appears, it did not matter whether or not the constitution empowered him to act "in his discretion" or "in the exercise of his individual judgment". What mattered was that he had the right under the constitution to appoint and dismiss his Ministers. Even if the elimination of these expressions had any definite meaning about which Pakistan's Governor-General apparently had doubts, it did not in any way qualify his right in respect of the appointment or dismissal of his Ministers. In order to clinch the issue a statement was issued from the British Commonwealth Relations Office making it clear that, in its opinion, no objection could be taken, on legal or constitutional grounds, to the action taken by the Governor-General in dismissing the Nazimuddin Cabinet. Not that British intervention was possible or desirable in the circumstances even if the Governor-General's action were legally and constitutionally invalid, but the British Government took the earliest opportunity to remove any doubt or confusion in regard to the controversy.

It is not for me to go into the question of the propriety or otherwise of the step adopted by the Pakistani Governor-

General. I am concerned only with the legal and constitutional aspects of the issue, canvassed for a few days on behalf of the two contending parties. It is, of course, true that the Governor-General would have placed himself in an embarrassing position had no person agreed to form the Government in such conditions. It is clear, too, that Mr. Mahommed Ali's readiness to aid and advise the Governor-General in the formation of a new Cabinet implies his acquiescence in, if not acceptance of, the interpretation put by the Governor-General on his powers in relation to his Ministers. Whether Mr. Mahommed Ali should or should not have acted in the manner he did is, however, a different matter which I need not discuss. That is, broadly speaking, a political issue.

17. Possible Cases of Conflict Between President and Union Ministers

Now, the President of India has no power under the constitution to act "in his discretion" or "in the exercise of his individual judgment". These expressions have been dropped completely with reference to his functions. From this the inference is drawn that in all matters the President is bound by the advice of his Ministers. This theory is supported by the constitutional provision as to (a) the collective accountability of Ministers to the House of the People, and (b) the requirement of the Prime Minister's advice as a condition precedent to the exercise by the President of his power to appoint other Ministers. It is further argued that had the Constituent Assembly intended that the President would have power to ignore the Ministers or to disregard their advice, those two familiar expressions would have been reproduced in the constitution. As they have not done so, it is contended, the President cannot in any circumstances act otherwise than in accordance with the advice tendered by the Prime Minister and his colleagues.

I am afraid that from the legal standpoint this theory is not free from doubt. Suppose a Ministry is defeated in the House of the People on an important issue. The

Prime Minister then asks the President to dissolve the House and to order fresh elections. Suppose the President refuses to oblige the Prime Minister and instead invites the Leader of the Opposition to form the Ministry, who responds to the invitation and forms a Ministry and carries on the Government. What is called the parliamentary situation may be manipulated, as is well-known by the distribution of patronage among persons wedded to constitutional politics, and there are vast powers of patronage vested in the President. On what ground except perhaps that of political impropriety can the President's action be challenged ? The defeated Prime Minister cannot go to a court of law and get it nullified by a judicial order, for the court's jurisdiction is barred in this respect. Nor can he get the President removed from office by impeachment for the alleged violation of the constitution because a defeated Prime Minister cannot normally expect to secure the requisite majority for the purpose. There is thus no legal or constitutional remedy against the President.

One may, in condemnation of the President's action, cite any number of ancient British saws and modern Dominion instances, but one must remember all the time that they may not count at all in the determination of political issues. Of course, it would be difficult, if not risky, for a President to try to play this game against a Prime Minister, who is in command of a majority in the House of the People. To ignore such a Prime Minister or to disregard his advice is bound to lead to a conflict, which may end in the President's removal by impeachment, or produce conditions of a civil war. I must not be understood to imply that I am in favour of the President's powers set against those of his Ministers. What is intended to explain is that the dropping of the phrases in his discretion "or in the exercise of his individual judgment" with reference to the exercise by the President of his functions, does not carry with it the implication in law that he is, in all circumstances, bound by the advice of his Ministers. Normally, however, and as a principle of constitutional propriety there is support for the view that the President

is not to act except in accordance with the advice tendered by his Ministers. That view is reinforced by the constitutional provision that there can be no Government under any condition without a Council of Ministers held jointly responsible to the House of the People.

18. The Role of Governors or Rajpramukhs

As regards the States (Part A and Part B States), the law provides that there shall be a Council of Ministers to aid and advise the Governor or Rajpramukh except where he is required, by or under the constitution, to act in his discretion. This is one point of dissimilarity between the Centre and the States, for whereas the President has no discretionary power, the Governor or Rajpramukh of a State has been given such power. There is another point of dissimilarity, and it lies in the fact that whereas no constitutional breakdown is contemplated for the Centre in any circumstances, the entire Ministerial set-up may be suspended or otherwise affected in any State not only upon Proclamation of Emergency but also on other grounds. These two points of dissimilarity or difference should be borne in mind in examining the true nature and character of responsible government in a State, and of the role of the Governor or Rajpramukh in relation to his Council of Ministers.

As to the exercise of discretion vested in the Governor or Rajpramukh (article 163 and Part VII), the question is, can the Governor or Rajpramukh act in his discretion in the exercise of all or some of his functions ? The answer is that he can use this power only where he is required by or under the constitution so to act. The idea seems to be that only in matters expressly specified in the constitution this power may be exercised, and not otherwise. But mention is specifically made only of (a) licenses or leases for the purpose of prospecting for, or extraction of, minerals in respect of any area within an autonomous district in Assam, and (b) application of the provisions of the Sixth Schedule to the tribal area embracing the North-East Frontier Tract and the Naga

Tribal Area (Sixth Schedule, paragraphs 9 and 18). It is obvious that this is a discretionary power exercisable by the Governor of Assam. No such power is conferred by or under the constitution on the Governor or Rajpramukh of any other State in respect of any of his functions.

The discretionary power as contemplated under article 163 is in general terms, and has no reference specifically to any subject, or to any of the functions assigned to the Governor or Rajpramukh. The Government of India Act, 1935, definitely referred to functions which the Governor was required to exercise "in his discretion". For instance, section 51 (5) laid down that the functions of the Governor with respect to the choosing and summoning and the dismissal of Ministers "shall be exercised by him in his discretion". The conclusion is sought to be drawn from these and similar other provisions read with those of our present constitution conferring discretionary powers on Assam's Governor that the exercise of discretion by the Governor or Rajpramukh of any other State in respect of any of his functions would be beyond his authority and consequently invalid. It amounts to saying that the use of the expression "in his discretion" in article 163 is surplusage, except for the Governor of Assam in regard to those two specified functions. That means that Governors or Rajpramukhs are constitutional heads of States and are bound by the advice of their Ministers in all matters within their respective jurisdictions. This is one line of argument.

19. A High Judicial Pronouncement

The question of the position of a State Governor in relation to his Council of Ministers was canvassed in the case of *Sunil Kumar Bose and others v. The Chief Secretary to the Government of West Bengal* (1950) decided by the Calcutta High Court. The Court observed *inter alia* : "The Governor under the present constitution cannot act except in accordance with the advice of his Ministers. Under the Government of India Act, 1935, the position was different. The Governor could

do certain acts in his discretion without asking for the advice of any Ministers; he could do certain acts in his individual capacity, that is, only after consulting the Ministers but he was not bound, when acting in his individual capacity, to follow the advice of his Ministers. Under the present constitution the power to act in his discretion or in his individual capacity has been taken away. The Governor, therefore, must act on the advice of his Ministers. This is the constitutional position as explained to us by the Advocate-General and we accept his view."

I have made this longish quotation in order that one may not miss the full and exact picture of the mind of the judges with regard to such an important question. To begin with, what do the judges mean by a Governor acting "in his individual capacity" ? In so acting, did a Governor act, under the repealed statute, as Mr. so and so, and not in his capacity as a Governor ? The expression "in his individual capacity" conveys no other meaning, but to give any such meaning to the relevant provisions of the Government of India Act, 1935, is as absurd as it is fantastic. Indeed, no such misleading phrase was inserted in that Act; the expression used was "in the exercise of his individual judgment". Literally no less than from the point of view of law, there is a good deal of difference between the expression "in his individual capacity" and the expression "in the exercise of his individual judgment." A person acts "in his individual capacity" irrespective of his official position, while acting "in the exercise of his individual judgment" an official solely relies on his own judgment in disregard of the advice or opinion tendered by his advisers. Again, the High Court erred in thinking that a State Governor under the present constitution had no power to act "in his discretion". On the contrary, he has been given such power, as will be clear from a cursory glance at article 163 of the constitution.

The issue is not whether such power exists because it does; the issue is where and in what circumstances it may be used by a Governor because the phrasing in the present constitution, by contrast with that of the repealed Act,

is rather clumsy and loose. Furthermore, the law requires the Governor to decide in his discretion in what particular case or on what particular occasion he should or should not act "in his discretion". It is entirely an administrative or political decision which it is not within the competence of a court of law, whatever its status, to call in question.

Apart from the gross errors of fact as well as, of law which this decision betrays, it seems amazing that a court of the stature and reputation of the High Court of Calcutta should have expressed opinions on an issue which in no way attracts their jurisdiction. No less astounding is the interpretation said to have been given by the highest law officer of the State of West Bengal. Notwithstanding the law officer's interpretation, the judges should have realised that a court, sitting as a court, should refrain from giving a decision which, as in this case, has no effect in law. No Governor need politically take the Calcutta High Court's decision in *Sunil Kumar Bose's case* into account in discharging his functions under the constitution. It should, however, be admitted that otherwise it is a remarkable judgment enunciating, as it does, certain important principles of law bearing on the relations between the different organs of the State and those between the State and the citizen.

Reverting to the theory of surplusage earlier referred to, one is not entitled, according to the recognised principles of statutory construction, to presume surplusage, unless the contrary is established beyond any shadow of doubt. Moreover, the constitution has deliberately distinguished the role of the President, who has been given no power of discretion, from that of the Governor or Rajpramukh, upon whom that power has been conferred. It is contemplated that while the advice of Ministers is normally binding upon the heads of the Union and States, in the case of the Governor or Rajpramukh circumstances may arise where the exercise of discretion by him is not only necessary but proper. What, it may be asked, are those conceivable circumstances ? To that the omnibus answer is that it

is for him to decide in his discretion in what particular matter he should or should not act in his discretion and that his decision in this regard is final, and not susceptible of judicial adjudication [article 163 (2)].

The correct approach to the whole issue should be one of examination of the fundamental difference between the Union structure and that for a State. The constitution, as has been shown, is dominated by a strong centrepetal bias. Whatever autonomy is granted to the States is subject to direction, superintendence and control by the Centre. The Governor is appointed by the President, and may be dismissed by him at any time he likes. He is, in many respects, an agent of the President and, through the President, of the Union Government. When he may happen to act in that capacity he will presumably act on his own initiative or in accordance with directives or instructions from the Union Government. In such cases, his Ministers may be completely ignored or their advice, even though asked for and offered, disregarded. No such conflict between the President and his Ministers is envisaged. This appears to me to be the real explanation of the deliberate omission of the phrase "in his discretion" with reference to the exercise of functions by the President, and of the use thereof in connection with the functions of the Governor or Rajpramukh. The President and his Ministers are expected to act in unison. The Governor or Rajpramukh and his Ministers, on the contrary, may act at cross purposes, and where conflicts arise the Governor or Rajpramukh is to ignore the Ministers and to go ahead with the blessings, support and sanction of the Union Government.

20. Where Governors or Rajpramukhs as Union Agents

For the purposes of elucidation the issue may be posed in a concrete form. Suppose a party comes to power in West Bengal, which is ideologically and otherwise opposed to the ruling party at the Centre, and seeks to carry on the administration in disregard of the instructions from the Centre. Suppose, again, the

ruling party at the Centre, for political or other reasons, does not like that persons outside of its control and discipline should be at the helm of affairs in the State. Suppose, furthermore, the Governor feels embarrassed having had, on the doctrine of ministerial responsibility, to sanction acts which do not commend themselves to the Union Government but which normally cannot be countermanded by the latter.

What does happen in those circumstances ? Well, the constitution contemplates that the Governor shall act in his discretion. In other words, the Governor shall act without consulting his own Ministers but at the same time in pursuance of the directive he may receive from the Union Government. Should the Governor fail or hesitate to behave properly the President, on the advice of his own Ministers, may call him over the coals and, if necessary, replace him by a new dependable incumbent. The Governor's Ministers cannot shield him against the displeasure of the Union Government, nor does the constitution give him any protection whatsoever. An apt illustration is provided by the suspension of the normal machinery of government in PEPSU in 1953, despite the emphatic protest of the Ministry of the State.

Take, again, the provision relating to the making of a report to the President about the failure of the constitutional machinery (article 356). Is it contemplated that the Governor or Rajpramukh cannot, in any event, make the report without consulting his Ministers and against their advice ? It may be that Ministers have lost the confidence of the State legislature but continue to be in the good books of the Union Government. The Ministers feel that a dissolution would not help them. In such a case, they may advise the Governor or Rajpramukh to, make a report to the President, and the Governor, in concurrence with his Ministers, acts accordingly. The normal constitutional machinery is declared by the Centre to have broken down in the State. Alternatively, it may be that the Union Government do not approve of the policy of the Ministers of the State, who are backed

wholeheartedly by the legislature. In such a case there may be correspondence between the Governor and the President without the knowledge of the Ministers, followed by the Governor's report. The result, of course, is the same—the President's Proclamation of the breakdown of the constitutional machinery in the State. Therefore, discretion may or may not be used by the Governor or Rajpramukh, according to the exigencies of a given situation. One may also conceive of circumstances in which the Union Government and the Ministers of a State are in agreement on all important questions of policy and procedure but the Governor or Rajpramukh is a reluctant or unwilling participant in the enterprise. In such an event, which is not likely to happen, the Governor or Rajpramukh may be censured or dismissed.

21. The Scope of Discretionary Power

Everything, it is clear, depends on the circumstances, the nature of conflict of interests, the gravity of the issues involved and like considerations, but all these phenomena are traceable, in the final analysis, to the failure of the relations of production to march in line with the productive forces, which is reflected in the conflict of classes. The class conflict may take different forms at different times. Sometimes ideological and juridical principles are bandied about to confuse the ordinary folk and to keep away from the public the real character of the class conflict under the mask of national unity versus State rights; of collective will in opposition to the wills of all; of national peril in the face of foreign aggression; of the security of the State set against the freedom of individuals, and so on and so forth.

Too much importance need not, however, be given to the phrase 'in his discretion' used with reference to the functions of the Governor or Rajpramukh, or to the omission thereof in respect of those of the President of India. The phrase cannot be tested in a court of law, nor is the interpretation put on it in the Royal Instrument of Instructions issued to Provincial Governors under the Act of 1935, of force and effect in the changed conditions of today. Where the

interpretation of a word or phrase in the constitution is left, as in this instance, to the Governor or Rajpramukh, there is no appeal from that interpretation except to the authority to whom he owes his appointment and on whose pleasure his tenure depends. That authority is the President and, through him, the Union Government.

One may shout and say that a Governor or Rajpramukh should or should not ignore his Ministers in a particular matter, but one can only shout and bark. And the State caravan passes on. Suppose Assam's Governor takes into consultation his Ministers and acts on their advice even where he is required to act in his discretion. One cannot call him to account in a court or otherwise challenge him effectively. It is the Central Government that alone may intervene should they be persuaded that Ministerial participation in the tribal affairs in Assam is not desirable.

I believe the vesting of the 'discretionary' power in a State Governor or Rajpramukh does not materially affect the relations between that official and his Ministers despite the lucubrations of constitutional pundits. Normally, whether there is discretion or no discretion, he takes the Ministers into his consultation in all matters and acts on their advice. But if he acts otherwise even where he is given no power to exercise his discretion there is no legal remedy. At the Centre the President cannot ignore Ministers in command of a majority in the House of the People without a grave risk to his own tenure or without precipitating a conflict or which the constitution has made no provision. In the States, on the contrary, the Union Government have power to upset the apple cart at any moment they like. Therefore, the controversy about the implications of the phrase 'in his discretion' is of purely academic interest.

22. The Status of Part C States and Other Territories

The doctrine of parliamentary government or ministerial responsibility as such has not been recognised in the constitution for Part C States. They are administered by the President through chief commissioners or lieutenant-

governors appointed by him. They may also be administered through the Government of a neighbouring State. This latter procedure cannot be adopted save after (a) consulting the relevant Government; and (b) ascertaining, in such manner as the President considers most appropriate, the views of the State concerned (article 239). Parliament may by law create or continue for any Part C State a legislative body wholly or partly elected. It may also create or continue a Council of Advisers or Ministers. What powers or functions this body or Council shall exercise or what their constitution shall be may be specified in the parliamentary enactment. No law made by Parliament in these regards shall be deemed to be an amendment of the constitution for the purposes of article 368, notwithstanding that it contains any provision which amends or has the effect of amending the constitution (article 240).

Any territory specified as D Territory and any other territory comprised within the territory of India but not specified as D Territory (e. g. old French Chandernagore) is administered by the President acting, to such extent as he thinks fit, through a chief commissioner or other authority appointed by him. The President may make regulations for the peace and good government of any such territory. Any regulation so made may repeal or amend any law made by Parliament or any existing law which is, for the time being, applicable to such territory. It shall have the same force and effect as an Act of Parliament which applies to such territory (article 243).

23. The Legal Immunity of President, Governors and Rajpramukhs

The President of India or the Governor or Rajpramukh of a State is not subject to the jurisdiction of any court in respect of official acts, that is, of any act done or purporting to be done by him in the exercise or performance of the powers and duties of his office. No criminal proceedings may issue against them while in office, nor can there be any process for arrest or imprisonment for the term. When, however, they cease to hold office prosecution

may be initiated for an offence committed by them even while in office. During the term civil proceedings may be started for personal obligations arising before they joined office or while they are in office. But it is essential that two months' notice prior to the institution of suits has to be given (article 361). The immunity thus given does not protect the President against impeachment upon a charge of violation of the constitution or the Governor or Rajpramukh against dismissal by the President acting presumably on the advice of his Ministers. Nor does it prevent appropriate proceedings being brought or initiated by any person against the Government of India or against the Government of a State. It should be noted that the chief commissioners or lieutenant-governors are not given the protection accorded to the President, Governors and Rajpramukhs.

While making laws or taking executive action the appropriate authorities (Central or State, as the case may be) must have due regard to the guarantee or assurance given under any covenant or agreement referred to in article 291, with respect to the personal rights, privileges and dignities of the Ruler of an Indian State (article 362). No court shall take cognizance of any offence alleged to have been committed by the Ruler of a former Indian State except with the previous sanction of the Union Government. The Government may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of a Ruler is to be conducted, and specify the court before which the trial is to be held (section 197-A Cr.P.C.).

The immunity or protection given to the President, Governors and Rajpramukhs may be traced to the principle of perfection attributed to the English monarch. It was applied originally under the British regime in India not only to the Governor-General and the Governors of Provinces but also to Executive Councillors and even Ministers. From time to time, however, it was altered, but the Governor-General and Governors continued, amidst all changes, to enjoy this special privilege.

CHAPTER XI

THE SERVICES IN ADMINISTRATIVE MECHANISM

1. Are Ministers Officers?

The constitution, as is explained in Chapter X, has vested the executive authority of the Indian Union in the President who exercises it directly or through officers subordinate to him. There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. Almost the same legal formula is applicable to Part A and Part B States except (1) that the expression 'The Governor' or the expression 'The Rajpramukh' is substituted, as the case may be, for the expression 'The President' ; and (2) that the Governor or Rajpramukh is to act in his discretion where he is required so to act by or under the constitution.

Several important issues arose, it may be recalled, under the Government of India Act of 1935. These were: (1) whether a Council of Ministers could be treated as the executive government of a province; (2) whether the Ministers, individually or collectively, had any executive functions; and (3) whether they were officers subordinate to the Governor. On all these points the High Court of Calcutta answered in the negative in two well-known cases.

The first case was *Dhirendranath Sen and another v. The King-Emperor* (1938). This was an appeal to the High Court at Calcutta from a judgment of the Chief Presidency Magistrate, convicting the appellants of sedition in respect of a leading article published in the *Hindusthan Standard* on the 27th November, 1937. The High Court held (1) that there was no specific provision in the Government of India Act vesting the Ministry with executive functions, it being clearly understood that such functions, in terms of the Act, "shall be exercised by the Governor either directly or through

officers subordinate to him" ; and (2) that a Ministry, chosen from the elected representatives of the people, and empowered, within prescribed limits, to dictate the policy of the Government was not "in any real sense a body of officers subordinate to the Governor". In the result the appeal was allowed, and the convictions and sentences set aside on those grounds as well as on the merits of the case.

The second was a reference case : *The King-Emperor v. Hemendra Prosad Ghose and another* (1939). The accused had been charged with sedition in respect of two articles published in the *Basumati*, which contained attacks on the Bengal Ministry. The trying magistrate referred to the High Court three questions under section 432 Cr. P.C. These were (1) whether the Ministers were officers subordinate to the Governor within the meaning of section 49 of the Government of India Act; (2) whether the Council of Ministers should be treated as Government' established by law; and (3) whether a Ministry could be said to form part of the executive government within the meaning of section 17 IPC. The questions were considered by a Full Bench of the Calcutta High Court, and the unanimous answer given by them to each of those three questions was in the negative. The High Court pointed out that the decision given by them was an opinion, and not a judgment, decree or final order. Nevertheless, both this 'opinion' and the earlier judgment left no doubt as to the position, status and functions of Ministers or the Council of Ministers under the Government of India Act, 1935, in the executive set-up of a province.

2. Calcutta High Court overruled by Privy Council

The 'judgment' and 'opinion' of the Calcutta High Court legally held the field until 1945, when, in the case of *King-Emperor v. Sibnath Banerji* the Privy Council in effect overruled that Court. They observed *inter alia* : "So far as it is relevant in the present case, their lordships are unable to accept a suggestion by counsel for the respondents that the Home Minister is not an officer

subordinate to the Governor within the meaning of section 49 (1) and so far as the decision (*sic*) in the *Emperor v. Hemendra Prosad Ghosh* decides that a Minister is not such an officer, their lordships are unable to agree with it. While a Minister may have duties to the legislature, the provisions of section 51 as to the appointment, payment and dismissal of Ministers and section 59 (3) and (4) of the Act of 1935, and the business rules made by virtue of section 59 place beyond doubt that the Home Minister is an officer subordinate to the Governor”.

This ruling did not, of course, cover in so many words the other issues decided by the Calcutta High Court, namely, (1) whether a Council of Ministers meant the executive government of a province; and (2) whether Ministers, individually or collectively, had any executive functions at all. But if, as the Privy Council held, a Minister is an officer subordinate to the Governor, it follows, unless the contrary is established, that he has executive functions as well. And a body of officers, who are subordinate to the Governor and as such exercise executive functions, is, to be sure, part of the executive government. It appears, therefore, that the ‘judgment’ and the ‘opinion’ given by the High Court in the afore-mentioned two cases on all the issues canvassed before them have, to all intents and purposes, been quashed by the Privy Council.

But neither the Act of 1935, nor the present constitution which is, with certain exceptions, a verbatim reprint of that Act in this regard, seems to sustain the Privy Council ruling at least on the point directly dealt with by them. Ministers are members of the appropriate legislature and are accountable to it for their acts. They do not cease to be legislators on being appointed as Ministers; indeed as Ministers ‘they initiate important legislation. They formulate policy in administration as well as in legislation. They are not members of any cadre of the statutory services or persons in the employ of the Union or the State on contract service. Consequently, to hold now, as the Privy Council have held, that Ministers are officers subordinate to the Governor or to the President, as the case may be,

would amount to reducing the Union Government or the Government of a State to colonial status. Even under the Government of India Act, 1935, there was no ground for the view taken by the Privy Council in *Sibnath Banerji's case*. In our present setting no weight, I venture to suggest, should be given by the Indian courts to that glaringly wrong and erroneous ruling. The Calcutta High Court's judgment or opinion on this point, by contrast, seems to me politically and constitutionally correct and legally sound.

3. Are Ministers Executive Government ?

Doubt may, however, be reasonably entertained as to the soundness or correctness of the *view* taken by the Calcutta High Court that under the Government of India Act, 1935, Ministers were neither part of the executive government of a province nor had any executive functions. They referred to section 49 (1) of the Act, which laid down that "the executive authority shall be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him". In their opinion, "the executive authority" was the same thing as the legal authority to administer the executive government of a province.

Reliance was further placed on section 59, which provided *inter alia*: "All executive action of the Government of a province shall be expressed to be taken in the name of the Governor." The use of the word 'aid' in section 50 with reference to the functions of Ministers did not, in their view, vest the Ministers with any right to exercise "executive authority". They held that a different construction would be contrary to the clear provisions of section 49. They stated that there was no specific provision in the Government of India Act or in any other statute or Act vesting the Ministry with executive functions. Consequently, the position was that, unless Ministers were held to be officers subordinate to the Governor within the meaning of section 49 (1) of the Act, they could not exercise executive functions or form part of the executive government of a province. And they concluded for reasons

stated earlier that Ministers were not "officers subordinate to the Governor" within the meaning of section 49, adding that although in popular language the Ministers were frequently referred to as "the Government" they were not "the Government."

On the face of it, there is considerable force in the arguments put forward by the High Court in support of their judgment or opinion. The definition of 'Government' given in one or two relevant Indian statutes seems to reinforce those arguments. I have already mentioned the definition of 'Government' in the IPC and the adaptation thereof after the commencement of the present constitution. Now, the General Clauses Act defined the 'Provincial Government' in a Governor's province under the Government of India Act, 1935, as meaning "the Governor acting or not acting in his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by or under the said Act" [section 3 (43a)]. There was thus no mention of Ministers in the definition even where the Government of India Act or the Instrument of Instructions contemplated that no action should be taken by a Governor except in accordance with the advice tendered by Ministers.

In strict law, therefore, no exception may be taken to the Calcutta High Court's judgment or opinion in this regard. Indeed it was clear from the language of the appropriate statutes and adaptation orders that the British Government had no confidence in responsible Indian Ministers and deliberately kept the latter at a distance from the directing machinery of the State, so that in any grave emergency, apart from recourse to section 93 or any other coercive measure, they could fall back upon a legalistic defence of their imperialistic policy or programme. The implications of the Government of India Act, 1935, with particular reference to the position of Ministers, were fully exposed when the Second World War broke out in 1939.

Despite all this, normally Ministers were policy-makers, though within prescribed limits. Their instructions were, as a rule, issued in the form of executive orders over the

signatures of the permanent secretaries or under the authority of the Governor except where the latter chose to act "in his discretion" or "in the exercise of his individual judgment". The executive functions were discharged within a province or the "Provincial Government" was, on the whole, run in accordance with those instructions. To deny in such circumstances that Ministers were part of the executive government or had executive functions sounds much too formalistic. Politically and perhaps also from the constitutional, as distinguished from the purely legal, standpoint it is difficult to subscribe to the view taken by the Calcutta High Court in regard to the position of Ministers in the executive or administrative mechanism in the two cases already cited.

4. The Present Position of Ministers

Has the present Indian Constitution, it may be asked, made any material difference in the position of Ministers at the Centre or in the States in respect of the points examined by the Calcutta High Court and, later, by the Privy Council under the Government of India Act, 1935? The answer, legally, is 'no'. What does 'Government' mean in the present context? It means, as was pointed out previously, the Central Government or the Government of a State. The "Central Government", according to the General Clauses Act, means the President in relation to anything done or to be done after the commencement of the constitution. In relation to functions entrusted under clause (1) of article 258 of the constitution to the Government of a State, it includes the State Government acting within the scope of the authority given to them under that clause. In relation to the administration of a Part C State, it includes the chief commissioner or the lieutenant-governor or the Government of a neighbouring State or other authority acting within the scope of the authority given to him or them under article 239 or article 243 of the constitution, as the case may be [section 3 (8)]. The "State Government" means, in a Part A State, the Governor; in a Part B State, the

Rajpramukh; and in a Part C State, the Central Government [section 3 (60)].

Following the Government of India Act, which it has repealed, our present constitution, it is clear, makes no reference to Ministers in connection with the executive government or the exercise of executive functions either at the Centre or in the States. With consequential changes of minor importance the language used in the Government of India Act, 1935, with reference to the "executive authority" has been reproduced in the present constitution. Therefore, the legal position of Ministers in relation to the executive government or the exercise of executive functions has not changed materially, although politically and from the constitutional standpoint the role played by Ministers in the new set-up is far more important than it was under the repealed Act. The position is that executive orders are not formally issued in their names or countersigned by them but are nevertheless based on instructions given by them and on the policy laid down by them from time to time. They are not "officers subordinate" to the President, Governors or Rajpramukhs, but at the same time it cannot be reasonably denied that they are, in fact, though not strictly in law, part of the executive of the Union or, as the case may be, of the appropriate States.

There is, however, an obvious lacuna in the constitution in that nowhere is it specifically stated that Ministers have executive functions. This is another instance of slavish adherence to the form and content of a constitutional document designed deliberately to suit imperialist rule and colonial economy. In their excessive enthusiasm for a British statute and its morphology the draftsmen of our constitution individually and collectively and the Constituent Assembly as a body failed to recognise the far-reaching changes in the political scene and their legal and constitutional consequences.

5. The Secretariat Organisation

The technicalities apart, the Union executive consists of (i) the President, (ii) the Ministers, (iii) the armed

forces, (iv) members of the All-India Services, (v) members of the Union Services, and (vi) persons holding civil posts under the Government of India. *Mutatis mutandis* Part A and Part B States have almost the same administrative set-up. For the purpose of executing policy and implementing programme the entire machinery at the Centre as well as in the States is divided into departments which operate from the headquarters. One or more important departments are in charge of a Cabinet Minister who may be assisted by a Minister of State or Deputy Minister. A Minister of State may be placed in charge of one or more departments, more or less of minor importance. The constitution has made no classification of departments, but it is done on the advice of the Prime Minister or the Chief Minister in the name of the President or of the Governor or Rajpramukh respectively.

While the main work is done at the secretariat at New Delhi a large number of personnel of certain departments, so far as the Centre is concerned, are scattered over the States, and the departments concerned are branched off accordingly. The personnel of the great transport services, customs, income tax, posts and telegraphs and similar other departments, for instance, have their local or zonal centres of administrative apparatus. They are responsible to their respective departmental heads who, again, are subject to instructions from the relevant permanent secretaries. The secretaries are generally members of the senior services recruited under the old regime by the Secretary of State or by the Secretary of State in Council or, in certain cases, of the newly created Indian Administrative Service.

Some posts are held by men outside these services on a contract basis, particularly where professional or technical qualifications are required. The proportion of such men and women in the civil employ of the Union Government is increasing at a fast pace, having regard to the expanding activities of the State and the growing need for expert knowledge for efficient conduct of business. In the main, the administrative machinery set up by the British remains.

The only important change that has occurred since the transfer of power is that all ranks and grades of the services, while holding office during the pleasure of the President, are held accountable, in fact, to a purely Indian Administration which is controlled by responsible Ministers.

In a component State, Ministers at the top guide and control policy, subject to intervention on occasion by the Legislative Assembly. Ministers hardly, ever at all, participate directly in the execution of policy or in the administration of public affairs. At the headquarters they have, always at their disposal, a vast army of civil servants working in accordance with routine at what is popularly known as the secretariat. The senior officials are called secretaries, joint secretaries or additional secretaries. They advise the Ministers on how policy should be applied and enforced. They tell them what results a particular policy may, in given situations, produce. Their advice may be accepted or overruled by the Ministers. The entire secretariat machinery is divided into departments, for example, the home department, the finance department, the education department, the local self-government department, the food department, the agricultural department etc. etc. Each Minister is placed in charge of one or more departments.

The work of co-ordination as regards policy is generally done by the Cabinet, especially by the Chief Minister. At the administrative level each department or more than one department are assigned to a secretary. Administrative co-ordination is sought to be secured and maintained by a very senior officer. Generally he happens to be the senior-most officer for the time being in the service of the State. Following the practice under the British regime, he is called the chief secretary. He exercises general powers of supervision over the secretariat. There are under-secretaries, assistant secretaries and assistants to assist the departmental secretaries and the chief secretary. The Delhi secretariat has no chief secretary so called. If co-ordination is possible at the centre without what I should call a 'chairwarmer' boss, I see no point in retaining this

office at the secretariat of any State. The British Government created this job not so much for the purposes of co-ordination as for keeping certain 'favourites' in reserve for appointment as executive councillors or provincial governors. No such considerations apply now.

Attached to the departments of the secretariat are so many directorates, for example, the directorate of education, the directorate of agriculture, the directorate of procurement, and so on. The directorates function generally on their own initiative but, on instructions, whenever necessary, from the relevant secretaries. This is about the headquarters. These preliminary remarks are, I should think, essential to a clear understanding of the district administration's source of power and authority.

6. The District as Unit of Administration

Except in big cities like Calcutta, Bombay and Madras, where special arrangements are made, the administrative machinery functions through a somewhat complicated apparatus spread over the districts. The district is thus the unit of administration. For administrative convenience and for other purposes the British rulers, almost from the very beginning, had demarcated the entire territory of every province into districts. In some provinces, however, these districts had been grouped together into larger units known as divisions. The districts as such had been divided into subdivisions, and subdivisions into thanas. These old divisions and subdivisions introduced under the British regime, more or less, remain intact except that in Bombay, for instance, the bigger units known as divisions have been abolished since 1950.

In West Bengal, Bihar, Assam and in several other States we have divisions, districts, subdivisions and thanas. We have in West Bengal two divisions, namely, Presidency Division and Burdwan Division. The Presidency Division comprises the districts of Darjeeling, Jalpaiguri, Cooch-Bihar, West Dinajpur, Malda, Murshidbad, Nadia and 24-Parganas. The districts assigned to the Burdwan Division are Birbhum, Burdwan, Bankura, Midnapur, Hooghly and Howrah.

The administrative mechanism for Calcutta proper is different for historical and other reasons. There is, incidentally, a popular belief that in Calcutta the functions appropriate to a district magistrate are exercised by the chief presidency magistrate. This is partly correct and partly not correct. Calcutta is not treated on the same footing as the districts usually so called. The chief presidency magistrate is essentially concerned with judicial functions in criminal proceedings of first instance within the limits of Calcutta proper. He has, of course, certain administrative functions too. The police commissioner does police work and exercises certain magisterial functions. The sessions is conducted by a High Court bench. And so on. This mechanism does not operate outside Calcutta proper, which is only part of what might be called municipal Calcutta. Bhowanipore, for instance, comes within municipal Calcutta but is outside Calcutta proper. It belongs, for the purposes of judicial proceedings, to the district of 24-Parganas.

At the head of each division there is an officer known as commissioner. Generally the commissioner is a senior member of the Indian Civil Service recruited under British rule by the Secretary of State or by the Secretary of State in Council. This service has been replaced by an All-India Service called the Indian Administrative Service. The commissioner is some sort of a liason officer between the secretariat and the district magistrates or deputy commissioners in charge of the districts within his division. He receives directions from the Government and, in his turn, gives instructions to the district officers. In special circumstances he directs the district officers how in any particular area law and order may or should be maintained and peace ensured. Normally, however, he is concerned with revenue matters and with local bodies such as municipalities, district boards, local boards and union boards or village panchayets.

7. The District Magistrate and His Functions

The head of the district is the district magistrate or deputy commissioner. The district magistrate is the chief

officer charged with the administration of a district. He exercises the powers of a magistrate by whatever designation he may be styled. He is sometimes called the district officer or collector. The heads of certain districts, for instance, those of the districts of Darjeeling and Jalpaiguri are called deputy commissioners, and not district magistrates. One may ask, why ? The reason is historical. In those districts the officers called deputy commissioners had certain special powers in view of the special conditions of the districts, their peculiar laws and ancient customs. Conditions have now changed materially, if not in their entirety. But the old name has not been given up. Magistrates known as deputy commissioners exercise certain special powers. For instance, the court of the magistrate of the first class in such a district may pass any sentence authorised by law, except sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years.

In the British regime the district magistrate was the *ma-bap* of the people within his jurisdiction. It was, of course, not the precise way of describing his position. But he was made to appear as the guardian of the law, dispenser of justice, protector of property and person and, to put it briefly, the district's guardian angel. The district magistrate was, as it were, the eyes and ears of the British Raj. Under the present system the powers of the district magistrate substantially remain the same. The atmosphere has, however, changed considerably. In the wake of that change has come about a change in the people's attitude towards him and, perhaps, too, in his attitude towards the people. In the district sometimes the people go straight to the constituency's member of Parliament or member of the State Assembly instead of to the district magistrate to ventilate grievances and to ask for their redress. That is natural, however much one may dislike it.

And yet the district magistrate's power and responsibilities are immense in the administrative mechanism. Nor are the territorial limits of his jurisdiction of no significance. In size districts vary. Have a look at the map.

You see in front of you the huge size of, say, the district of Midnapore or the district of 24-Parganas. By contrast, Malda or West Dinajpur looks like a tiny little village. The average size of a district India-wise has been put at about 4,430 square miles. As collector, the district magistrate is responsible for the collection of land revenue and, in appropriate areas, of forest revenue. He is in charge of the district treasury where the moneys collected from various sources in the district are deposited and accounted for and, if necessary, disbursed. Along with the collection of land revenue he collects the local cesses, the proceeds of which are allocated to the appropriate local self-governing bodies.

The district officer issues, generally on police report, arms licenses as well as licenses to vendors of liquors and wines. He exercises general powers of supervision over jails. He grants agricultural loans and distributes famine or scarcity relief. He is *ex-officio* chairman of government-managed secondary schools and colleges. He exercises extensive powers in respect of local bodies within the district such as district boards, local boards, union boards and municipalities. As a result of the increasing expansion of the activities of the State, additional duties and responsibilities have been cast on the district magistrate. The work in these new fields of activity is done directly by officers of the relevant departments, for instance, the food procurement officers, the enforcement officers, the relief and rehabilitation officers etc. etc. But in all important cases, the district magistrate's advice and direction are sought.

By far the most important functions still discharged by the district magistrate in most of the States are perhaps those connected with (i) the administration of law and order and (ii) criminal proceedings and trials. The district magistrate is a magistrate of the first class. In that capacity he may pass a sentence of imprisonment for a term not exceeding two years, of fine not exceeding one thousand rupees, and of whipping. Appeal lies to him from an order made or sentence passed by a second class or third class magistrate. He may transfer such

appeals to a first class magistrate subordinate to him. Whipping cannot be ordered by a second class or third class magistrate. A second class magistrate may pass a sentence of imprisonment for a term not exceeding six months, and of fine not exceeding two hundred rupees. In the case of a sentence passed by a third class magistrate, the term must not exceed one month and the fine not above one hundred rupees. In the discharge of his administrative, judicial and other functions the district magistrate is aided and assisted by a considerable number, of officers and men. The district magistrate is, as a rule, a member of the newly created Indian Administrative Service or of the old Indian Civil Service.

8. The Subdivisional Officer and His Functions

At the headquarters of a subdivision and within the limits of his jurisdiction the district magistrate is assisted by an officer called the subdivisional officer. He is, generally, an officer of the rank of deputy magistrate and deputy collector and, in certain cases, a member of the Indian Administrative Service. In his judicial capacity he must be a magistrate either of the first class or of the second class. Within his subdivision he does work practically corresponding to the work of the district magistrate, subject to the latter's superintendence and control.

Judicial functions exercisable by the district magistrate or the subdivisional officer are mainly carried out not by them but by officers respectively subordinate to them. For, much of their time is spent in the conduct and supervision of administrative affairs, including the police duties of the State in the area. They go about touring, the district magistrate throughout the district and the subdivisional officer throughout the subdivision, for the greater part of the year. In the course of these tours they supervise the work of their subordinates. They offer advice and guidance to local bodies. They try to bring under control difficult stations and collect information.

From time to time the subdivisional officer reports to the district magistrate. The latter, in his turn, reports

either direct or through the commissioner of his division to the State Government. The subdivisional officer, like the district magistrate, is assisted in his work by subordinate officers and assistants, for instance, deputy magistrates, sub-deputy magistrates and circle officers. It is, however, clear that the entire district magistracy combines, in itself, by the law of the land, extensive executive and judicial functions. Proposals for the separation of judicial from executive functions have long been canvassed in this country, and steps are being taken in certain States in that behalf.

9. The Police Organisation

In each thana, or police station, which is a unit of the subdivision, there is an officer in charge assisted in the exercise of his functions by subordinate officers and men. While dealing with the functions of the officer in charge of a police station, it is necessary to bear in mind certain aspects of the general organisation of the police force in order that no confusion may exist as to the relations of the police within a district with the district magistrate and his subordinate officers.

The administration of the police throughout a general police district, except for big cities like Calcutta, is vested in an officer styled the inspector-general of police, and in such deputy inspectors-general and assistant inspectors-general as the State Government may deem fit. The head of the Calcutta Police is the Commissioner of Police. He is assisted by deputy commissioners, assistant commissioners, inspectors and, so on. The entire area is divided into districts and the districts into police stations. The division of the police force, into the Bengal Police and the Calcutta Police, is a legacy of British rule, and there is no convincing reason why the two branches cannot be amalgamated into one force for the entire State. As it is, they are independent of one another, and their respective heads enjoy almost the same status and rank in the force.

A general police district may embrace any State or any part thereof. It may not necessarily be restricted to a district area in the technical sense of the term.

The administration of the police throughout the local jurisdiction of the district magistrate is under the charge of a district superintendent and such assistant district superintendents as the State Government may consider necessary. It is nevertheless under the general control and direction of the district magistrate. The State Government may declare that the authority exercisable by the district magistrate over and village watchman or other village police officer for the purposes of the police shall be exercised, subject to the district magistrate's general control, by the superintendent of police (The Police Act, section 4). The inspector-general enjoys the full powers of a magistrate within his jurisdiction, but the exercise of these powers is subject to such limitations as may from time to time be imposed by the State Government (The Police Act, section 5).

In his police work the district superintendent of police is assisted at the subdivisinal headquarters by his deputies called additional or assistant superintendents, deputy superintendents or circle inspectors. The officer in charge of a thana receives guidance and instructions from these officers. Subject to such guidance and instructions, he looks after the law and order situation within his jurisdiction. He is responsible to the superintendent of police but is generally under the control of the district magistrate except for routine work. The officer in charge receives first information reports about the alleged commission of offences. He gives aid and assistance, whenever necessary, in the suppression of crime or in the quelling of disturbances in a particular area. It is his duty to collect and communicate intelligence affecting the public peace, and to detect and bring offenders to justice. He may, without warrant, enter and inspect any drinking" shop, gambling house or other places of resort of loose and disorderly characters (The Police Act, section 23).

10. Special Measures in Cases of Disturbances or Apprehended Disturbances

Any magistrate or any officer in charge of a police station is empowered to command any unlawful assembly to

disperse. An assembly of five or more persons is designated an unlawful assembly if the common object of the persons composing that assembly is such as is mentioned in section 141 of the IPC. An assembly, which was not unlawful when it assembled, may subsequently become an unlawful assembly. An assembly of five or more persons likely to cause a disturbance of the public peace may likewise be commanded to disperse (Cr. PC, section 127). If force is necessary to disperse it, either a magistrate or a thana officer may use civil force (Cr. PC, section 128). But military force cannot be employed for the purpose except by a magistrate of the highest rank present on the spot (Cr. PC, section 129). A district magistrate, a chief presidency magistrate, a subdivisional magistrate, or any other magistrate (not being a magistrate of the third class), specially empowered by the State Government or the chief presidency magistrate or the district magistrate to act in this behalf, may issue orders in urgent cases of what the law describes as nuisance or apprehended danger. These are orders under section 144 of the Cr. PC. No such order shall, however, remain in force for more than two months, unless in certain cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the State Government otherwise direct.

With the consent of the State Government the inspector-general of police may depute additional police force in the neighbourhood of any railway and other works, should it appear to him that the employment of such additional force in such place is rendered necessary by the behaviour or apprehended behaviour of the persons employed upon such works (The Police Act, section 14). The State Government has power to declare that any area, subject to its jurisdiction, has been found to be in a disturbed or dangerous state, or that, from the conduct of the inhabitants of such area, or of any class or section of them, it is expedient to increase the number of the police.

When such a declaration is made, the inspector-general, or any other officer authorised by the State Government in

that behalf may, with the sanction of that Government, employ any force in addition to the ordinary fixed complement to be quartered in the area specified in the declaration. The cost of such additional force shall be borne by the inhabitants of the area or areas concerned. The State Government may, however, exempt any persons to class or section of such inhabitants from liability to bear any portion of such cost. The district magistrate is required, upon enquiry, to apportion the cost among the inhabitants, barring those exempted from liability, regard being had to the respective means of such inhabitants (The Police Act, section 15). The force so employed is popularly known as the punitive police, and the payment that the inhabitants are required to make for the cost of its maintenance is called the punitive tax.

11. Guarantees to Public Servants

One may ask now, by whom and on what conditions are officers and men in the employ of the Government of India or of a State Government appointed? Well, there are different classes or categories of public appointments. Under the British regime the Secretary of State in Council or, in its last phase, the Secretary of State recruited men to certain services in India. The Secretary of State for India was a British Cabinet Minister. Since the transfer of power to India and Pakistan that office has been abolished in Britain.

Perhaps the most important of the services recruited by the Secretary of State were the Indian Civil Service and the Indian Police. There are men of those services who are still in the employ of the Government of India or of the various State Governments. Our new constitution has retained them. Not only that: it has assured them that except as otherwise expressly provided, they will receive from the Union Government or the relevant State Government the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters as they were entitled to before its commencement (article 314).

Of course, the guarantees thus given cannot go beyond the limits permissible under the changed circumstances. For instance, except for Bengal, Bombay and Madras, the Governors were, as a rule, appointed from amongst the senior members of the Indian Civil Service throughout British India. These appointments are not offered to them now except in very special cases. Not that the constitution presents any bar, but an entirely different practice is being evolved by the President acting on the advice of his Ministers. On the other hand, in implementation of the constitutional guarantees, certain Indian Civil Service men continue to be judges of State High Courts or, since the commencement of the constitution, have been appointed to these high judicial appointments. Again, high diplomatic and consular offices have been thrown open to them. The Indian Civil Service is not yet dead, but it is dying. This service seems to have been replaced by the Indian Administrative Service. Persons recruited to this service are intended to fill up high administrative and secretariat posts which were formerly reserved, to all intents and purposes, for members of the Indian Civil Service.

12. Classification of the Services

The Indian Administrative Service is one of the two all-India services common to the Union and the States, created on the transfer of power, and recognised as such under the present constitution. The other one is the Indian Police Service. The constitution has given Parliament power, on the basis of a resolution passed by the Council of States by a majority of not less than two-thirds of the members present and voting, to create more such all-India services (article 312). These services must not be confused with what is known as the civil service of the Union. Unlike the all-India services, the latter is not common to the Union and the States. An officer of the Government of India's Public Works Department, for instance, is a member of the Union civil service, but not of any of the all-India services. Conversely, the district magistrate, say, of a Bombay, Bihar or West Bengal district,

who is a member of the Indian Administrative Service, is not a Union civil service man.

We have at present (1) the old Indian civil service, (2) the old Indian police. (3) the all-India services, and (4) the Union civil service. In addition, we have a State civil service. The State civil service, as the name implies, is the State counterpart of the Union civil service, and not of the all-India services. Deputy collectors, munsifs, sub-deputy collectors etc. are members of the State civil service. Besides, there are persons who hold civil posts under the Union or a State but are not members of the services mentioned above. They do not belong, that is, to the Indian civil service, the all-India services, the Union civil service or the State civil service. Generally they hold office for a fixed term on contract.

13. The Tenure During Pleasure

The recruitment and conditions of service of all persons appointed to public services and to posts in connection with the affairs of the Union or of any State shall be regulated by Acts of the appropriate legislature. Until such Acts are passed the President, in the case of the Union employees, and the Governor or Rajpramukh, in the case of State employees, may make rules in these regards (article 309). Except where otherwise provided by the constitution, employees of the Union, whether belonging to the services (defence or civil service) or holding posts outside the services, hold office during the pleasure of the President, and those employed in connection with the affairs of a State hold office during the pleasure of the Governor or Rajpramukh (article 310).

This provision seems to have been borrowed from the English system under which the Government servants are in law servants of the Crown. They hold office during its pleasure. What does the phrase "during the pleasure" mean? So far as the English law, as unaffected by the Crown Proceedings Act, 1947, is concerned, it means, essentially and primarily, that the Crown has power to dismiss a public servant in his discretion. But as was pointed

out by Blackburn in the Scottish case of *Mulvenna v. The Admiralty* (1926), it involves certain other points as well. The first is that the terms of service of a public servant are subject to certain reservations dictated by public policy, no matter to what service the employee may belong, whether it be defence or civil service, and no matter what position he holds in the service, whether exalted or humble. Public policy, no matter on what ground it is based, demands that those reservations must apply to a public servant. The next is that the reservations are to be implied in the engagement of a public servant, no matter whether they have been referred to in the engagement or not.

It follows that the rule based on public policy, which has been enforced against the personnel of the Crown's defence services and which prevents such personnel from suing for their pay on the assumption that their only claim is on the bounty of the Crown and not for a contractual debt, must equally apply to every public servant. It also follows that this reservation must be read, as an implied condition, into every contract between the Crown and its servant. Consequently, in terms of the contract a servant of the Crown has no right to his remuneration, which can be enforced in a civil court. His only remedy under the contract lies in an appeal of an official or political kind.

14. A Public Servant's Salary is only a Claim on the Crown's Bounty

Those principles are relied upon by the Privy Council in *The High Commissioner for India and the High Commissioner for Pakistan v I. M. Lall* (1948). This is an appeal by special leave from an order of the Federal Court of India, dated the 4th May, 1945, which varied a decree of the Lahore High Court, dated the 27th March, 1944. According to the Federal Court, the words "against the action proposed to be taken in regard to him" in subsection (3) of section 240 of the Government of India Act, 1935, required that there must be a definite proposal to

dismiss a public servant or to reduce him in rank, or, alternatively, to dismiss or reduce him in rank as and when the final action would be determined upon. The notice contained in the charge-sheet that possibly dismissal might be decided upon was not, in the Federal Court's opinion, adequate compliance with sub-section (3) of section 240. No opportunity to show cause against dismissal was given to Lall after dismissal had passed from a possible punishment to the punishment definitely proposed and recommended. The wording of sub-section (3) required something which had not been done in this case.

The Court held that Lall had been wrongfully dismissed from the Indian Civil Service, adding that Lall's proper remedy was damages for wrongful dismissal in breach of the statutory obligations imposed by sub-section (3) of section 240. He was nevertheless not entitled to a declaration that he had never been dismissed or that he still remained a member of the service. The Court granted Lall leave to amend his petition to claim damages for wrongful dismissal and remitted the case to the Lahore High Court.

The appellants appealed to the Privy Council against the Federal Court's remit to the Lahore High Court for the assessment of damages. The respondent, however, did not seek to maintain the order before the Privy Council. But he claimed that he was entitled to recover his arrears of pay from the date of the purported order of dismissal up to the date of action.

The Privy Council agree with the Federal Court in the view the latter took about the implications of sub-section (3) of section 240. According to them, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. On that definite stage being reached, the statute gives the civil servant the opportunity for which sub-section (3) makes provision. Therefore, the Privy Council maintain that Lall

had not been given the opportunity to which he was entitled under sub-section (3) of section 240, and that his purported dismissal did not conform to the mandatory requirements of the law. They add that such dismissal was void and inoperative and that the respondent remained a member of the Indian Civil Service.

As regards Lall's claim in respect of arrears of pay, the Privy Council reject it on the ground that "no action in tort can lie against the Crown" and "that any right of action must either be based on contract or conferred by statute". There is, in their opinion, no obligation as to pay in the respondent's covenant. They go further and point out that it has been settled ever since *Gibson v. East India Company*, (1839), that pay could not be recovered by action against the Company, but only by petition, memorial or remonstrance. Lall failed in his claim to arrears of pay.

The Privy Council's ruling is to the effect (1) that the Federal Court's judgment and order should be varied by substituting for the declaration made therein a declaration that the Government's order dismissing Lall from the Indian Civil Service was void and inoperative; (2) that Lall remained a member of the Indian Civil Service; (3) that the order for a remit in respect of damages for wrongful dismissal to the Lahore High Court should be set aside; and (4) that otherwise the Federal Court's judgment and order should be affirmed. It seems, however, that the Privy Council's ruling, in so far as it had a bearing directly or indirectly on the Crown's exemption from liability in tort or in respect of any other claim, has been materially affected by the provisions of the Crown Proceedings Act, 1947 (sections 1 and 2).

15. The Effect of the Constitutional Change

The services in India are, however, no longer the services of the British Crown, nor are men or women in the employ of the Union Government, or of the Government of a State, except for a certain number of personnel in the armed forces, the Crown's servants. What is the correct interpretation of the phrase "during the pleasure" used with

reference to the powers of the President, the Governor or Rajpramukh, in connection with public servants in the present constitutional setting ? At the outset two or three points which are introduced for the first time under the present constitution should be noted. First, there is, in addition to the two provisos to section 240 of the Act of 1935, a new proviso to article 311, which, in certain circumstances, dispenses with the necessity of giving a public servant a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. For instance, no such opportunity need be given where the President or the Governor or Rajpramukh, as the case may be, is satisfied that *in the interest of the security of the State*, it is not expedient to give it.

Second, if any question arises whether it is reasonably practicable or not to give to any person an opportunity of showing cause against the action proposed to be taken in regard to him, the decision thereon of the authority empowered to take action shall be final. Suppose the inspector-general of police has power to dismiss or remove a police sub-inspector or to reduce him in rank, and he proceeds to exercise that power against a particular sub-inspector. The sub-inspector concerned may not be given an opportunity to show cause against the action proposed to be taken in regard to him if the inspector-general is satisfied that for some reason, to be recorded by him in writing, it is not reasonably practicable to give the sub-inspector an opportunity of showing cause. And the decision of the inspector-general in this behalf is final and conclusive, so that no court shall be competent to go into the question. This ousting of the court's jurisdiction in this respect is an innovation introduced under the new constitution.

On the other hand—and this is the third point—in addition to the general safeguards against arbitrary *dismissal or reduction in rank*, which have long been provided for the services in India and continued under the Act of 1935, a new safeguard against arbitrary *removal* from service has been incorporated in the constitution. The difference

between 'dismissal' and 'removal' lies in the fact that while 'dismissal', as a rule, disqualifies a person from future employment, the latter does not necessarily imply such disqualification. Subject to these changes, the relevant provisions of the Act of 1935, in regard to the protection of the services have been adopted under the new constitution except that the phrase "the pleasure of the President, the Governor or Rajpramukh" has been substituted for the phrase "the pleasure of the Crown".

16. A Civil Servant's Right to Sue for Salary

One commentator maintains that save where the jurisdiction of the court is barred, the Privy Council's decision in Lall's case is still good law. In other words, under the present constitution, as under its predecessor, it is necessary, before certain action is taken against a public servant, that not only should he be given notice of the charges and asked to explain why he should not be dismissed, removed or reduced in rank but that an opportunity must be given him to show cause why *the particular punishment* proposed against him should not be inflicted. Where such opportunity is not given, as it was not given to Lall, the action taken is void and inoperative, and he is entitled to be restored to his original position in the service. But he has no right to sue for damages or for arrears of pay.

A contrary view is taken by another commentator, Who thinks that the Federal Court's ruling as to damages or arrears of pay should be followed rather than the Privy Council's decision on appeal in Lall's case. The latter decision, he argues, was founded on the Crown's immunity from action in tort, and followed the ruling in the case of *Mulvenna v. The Admiralty* that the remuneration in respect of service was a bounty of the Crown. Now that the Crown has no place in our present constitution and that the office is held during the pleasure of the President or of the Governor or Rajpramukh a suit for damages or arrears of pay is maintainable.

This interpretation does not evidently take into consideration the legal implications of the phrase "during the

pleasure", which is adopted from English law. It means, in the first place, that subject to the constitutional provisions, members of the services or persons holding posts may be dismissed, removed or reduced in rank by the President or Governor or Rajpramukh, as the case may be, at any time he likes. It means, in the second place, that, even where action taken is wrongful, the public servant concerned is not entitled to sue for damages or arrears of pay unless, of course, the right in that behalf has been conferred upon him by or under the constitution or a competent statute.

Certain provisions have been made, subject to the limitations already discussed, for protection against wrongful action, but there is nothing in the constitution giving a public servant wrongfully dismissed, removed or reduced in rank the right to sue for damages or arrears of pay. On the contrary, such right has been accorded to persons holding civil posts on contract outside the defence or civil services. Compensation may be given them for premature termination of the service or abolition of the post, except on established evidence of misconduct (article 310). This special provision made for holders of civil posts on contract, as distinguished from the personnel of the services, seems to imply that the constitution has given the latter no right to sue for damages in respect of any wrongful action taken against them, or for arrears of pay.

To sum up, the position seems to be this: No government servant in India, whether he is a member of the services or holds a civil post under the Union or a State, shall be dismissed or removed by an authority subordinate to that by which he was appointed. This rule is absolute. Then there is another rule which has been explained at length. It is that no order for dismissal, removal or reduction in rank can be validly made unless the victim has been given a reasonable opportunity not only to explain the charges but also to show cause against the specific punishment proposed to be meted out to him.

But that opportunity may not be given (a) if he has been convicted of a criminal charge, or (b) if it is found by the appropriate authority, for reasons to be recorded

by it in writing, that it is not reasonably practicable to give that opportunity, or (c) if the President, the Governor or Rajpramukh, as the case may be, is satisfied that it is not expedient in the interest of the State to give that opportunity. Should any question arise whether it is reasonably practicable or not to give to any person an opportunity to show cause, the decision of the authority to dismiss or remove him or to reduce him in rank shall be final (article 311). Where any action taken against a public servant is proved to be wrongful he is entitled to be restored to his position in the services, but without any right to sue for damages or for arrears of pay except in the case of a person holding a post on contract and whose appointment is terminated before the expiry of the period stipulated in the contract. The only remedy in respect of compensation or arrears of pay seems to lie in petition or representation to the appropriate Government.

17. The Lacuna in the Supreme Court's Judgment

Dismissing an appeal preferred by the State of Bihar against the judgment of the Patna High Court, which gave a decree for arrears of salary of a police officer, the Supreme Court have ruled (1954) that a suit for arrears of salary by a civil servant is maintainable in a civil court. In support of the Supreme Court's judgment the Chief Justice states *inter alia* :

The code of Civil Procedure from 1859 right up to 1908 has prescribed the procedure for all kinds of suits and the Section and the provisions of Order XXI substantially stand the same as they were in 1859. Those provisions have received recognition in all the Government of India Acts that have been passed since 1858 and the salary of its civil servants in the hands of the Crown has been made subject to the writ of civil court. It can be seized in execution of a decree attached. It is thus difficult to see on what grounds the claim that the Crown cannot be sued for arrears of salary directly by the civil servant, though his creditor can take it, can be based or sustained. What could be claimed in England by a petition of right can be claimed in this country by ordinary process. . . . To the extent that the rule that Government servants hold office during pleasure has been departed from, by the Statute, the Government servants are entitled to relief like any other person under ordinary law, and that relief, therefore, must be regulated by the Code of Civil Procedure

The case, it appears, centred round the construction of the provisions of section 240 of the Government of India Act, 1935, and not of the analogous propositions of law incorporated in the present Indian Constitution. Nor, for obvious reasons, it should be noted, is reliance placed by the Supreme Court for their decision on the change in the Crown's position in respect of liability in tort effected by or under the Crown Proceedings Act, 1947. The Supreme Court are perfectly right in holding, if I may say so with respect, that the constitutional restrictions and limitations on the exercise of 'pleasure' must be given effect. It does not, however, mean that the restrictions and limitations imposed by an ordinary statute supersede the constitutional provision for the exercise of 'pleasure'. Consequently, if the provisions of the Code of Civil Procedure or of any other similar statute are repugnant to the provisions of the constitution, then to the extent of repugnancy the latter must prevail.

Naturally the question arises, is there any provision in the Government of India Act, 1935, and, for that matter, in the present constitution, which restricts or limits the exercise of 'pleasure' to the extent of giving a public servant the right to sue for damages or arrears of pay ? To that question, I am afraid, the Supreme Court have not given a convincing answer. There is in the constitutional provisions, whether under the Government of India Act, 1935, or under the present system no reference whatsoever to liability in respect of damage or arrears of salary. All that they provide for is payment of compensation, in certain circumstances, to holders of civil posts on contract—a fact which may be interpreted as denying a civil servant, by contrast, the right to sue for damage, arrears of pay or compensation.

Again, it is common ground that the exercise of the 'pleasure' is subject to the specific safeguards provided in the constitution for members of the services, which have earlier in this chapter been dealt with at length. Regard being had to those safeguards, what, one wonders, does the exercise of the 'pleasure' precisely mean ? In vain have I searched for a ruling on this point by the Supreme Court.

They cannot say, as indeed they have not, that the phrase 'during the pleasure' is a drafting oversight or surplusage. As it is, the Supreme Court's judgment seems to have reduced that phrase to a nullity, which neither the constitutional provisions nor the rules of interpretation warrant.

Further, the Supreme Court have held that if a creditor is entitled, as he is, to attach a civil servant's *salary* in execution of a decree, there is no reason why the civil servant himself should have no right to sue for damage or arrears of salary. This is, without doubt, a plausible argument. But is it sustainable? I have my doubts. What is described as a 'bounty' undergoes a qualitative transformation when it is credited to the account of a civil servant, and only at that stage it is liable to attachment because it is then *salary* due to him in law. It is at least debatable whether or not the 'bounty' is attachable by a creditor before that stage. I see no reason why I should revise or modify the interpretation I have ventured to put on the phrase "during the pleasure" despite the Supreme Court's judgment to the contrary. There is nevertheless no doubt that whatever its merits or demerits, the judgment holds the field to the supersession of the Privy Council's judgment in I. M. Lall's case until, maybe, the Supreme Court themselves come to reverse their own decision sometime or other.

18. A Feudal Anachronism

It is not surprising that the Privy Council judges and the Supreme Court judges should have differed on the question of interpretation of the phrase "during the pleasure", for it is but natural that the latter should have betrayed lack of psychological awareness of the historical background of this English legal phrase. It is a feudal legacy, and notwithstanding their democratic professions Englishmen are, by temperament, reluctant to give up traditional forms, although new social developments have forced them to introduce, by parliamentary legislation, far-reaching changes in the position of the Crown. What

really is surprising is that the framers of our constitution should have reproduced this phrase from old English law, forgetting that ours is a democratic Republic and that the exercise of the 'pleasure' is obnoxious to the present-day employer-employee relations. While submitting that the Supreme Court have erred in their interpretation of the phrase "during the pleasure", I venture to think that their judgment, in a way, underlines the urgency of removing from a modern democratic constitution this English feudal anachronism.

19. The Judicial Immunity to Public Servants

Judges within the meaning of section 19 IPC, magistrates or public servants who are not removable from office save by or with the sanction of a State Government or of the Union Government, are given some protection in respect of judicial proceedings. They are entitled to this protection under article 313 read with section 197 Cr.PC. When any such person, for instance, is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction (a) of the Union Government in the case of one employed in connection with the affairs of the Union, and (b) of the relevant State Government in the case if one employed in connection with the affairs of the State. No such previous sanction is necessary for the institution of proceedings in respect of alleged offences which have no connection whatsoever with the official duty or function of the accused person.

Again, the Union Government or the State Government, as the case may be, may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of the public servant is to be conducted, and may specify the court before which the trial is to be held. Whatever the reason, on grounds of public policy, for this kind of protection, it involves the principle of discrimination between a public servant and a private citizen and conforms to some extent, to the rule of special treatment accorded

to public servants under the French administrative law. The expression 'public servant', for the purposes of protection in our country may include persons other than Government servants.

20. Public Service Commissions

I propose now to say a few words about the Public Service Commissions, their composition and duties and responsibilities (Part XIV, Chapter II). We have a Union Public Service Commission. We have a Public Service Commission for each State; alternatively, we may have a Joint Public Service Commission created under a Parliamentary statute for two or more States by consent of their respective legislatures.

In the case of the Union Public Service Commission or the Joint Commission, the President appoints the Chairman and other members. The Chairman and members of a State Commission are appointed by the Governor or Rajpramukh of the State. The age limit for a Union Commission member is sixty-five while that for a State Commission member is sixty. In no case, however, can a member continue in that capacity for more than six years from the date on which he enters upon his office. Members of the Public Service Commissions, including their respective Chairmen, may be removed from office by the President on the ground of misbehaviour after report on enquiry by the Supreme Court.

The number of members of the Service Commission is determined by the President, the Governor or Rajpramukh, as the case may be. But it is required that, as rarely as may be, one-half of the members must be persons who have held office for at least ten years under the Government of India or the Government of a State. In computing the period of ten years any period before the commencement of the constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included.

The Commissions must be consulted on all matters relating to methods of recruitment to civil services and to civil posts and other cognate questions. It shall be their

duty to conduct examinations for appointments to the services in their respective areas of jurisdiction. Consultation with the Commissions is mandatory in respect of specified matters, and so also is the holding of examinations for recruitment to services. It is, however, open to the President and the Governor or Rajpramukh to make regulations, each in his own area of jurisdiction, specifying in what case or cases or in what circumstances there shall be no consultation with the Commissions. Suppose the West Bengal Ministry and, for that matter, any other State Ministry or the Union Ministry, what to create a lucrative post for a particular person. They may ask the President or the relevant Governor or Rajpramukh to make rules placing the creation of the post as well as the selection of the candidate outside the consultative functions of the Commissions. Again, no consultation with the Commissions is required where appointments or posts are reserved for any backward class of citizens, which is not adequately represented in the services, or where, in the making in appointments to services or posts in connection with the affairs of the Union or of a State, the claims of the members of the scheduled castes and the scheduled tribes have to be taken into consideration.

It is competent for Parliament to make any law prescribing, in regard to a class or classes of employment or appointment to an office in any State or any local or other authority within its territory, any requirement as to residence within that State prior to such employment or appointment. It may, for instance, be enacted that no Indian citizen is eligible for any public employment in Bihar and, for that matter, in any other State, unless he is a permanent resident in that State. But legislation in this behalf may be enacted only by Parliament, and not by a State legislature. It seems that this provision may be used to nullify the effect of one single Indian citizenship.

The recommendations made by the Commissions are not binding on the appointing authorities. The latter may take action otherwise than in accordance with those

recommendations. The consultation, however, seeks to provide, in a somewhat distant and indirect manner, Some safeguard against the appointing authorities' perversely or, without sufficient cause, disregarding the Commissions' recommendations. For, the constitution requires the President and the Governor or Rajpramukh to lay before the legislature concerned the report of the relevant Commission made annually, together with a memorandum showing where the Commission's recommendations have not been accepted and for what reasons.

The question is whether the Commissions are to make reports direct to the President and the Governor or Rajpramukh, as the case may be, or through any particular Government department. The question further is whether the reports and the explanatory memoranda may be laid before the appropriate legislature without Ministerial intervention. About two years ago a controversy over these points arose in West Bengal. Nothing seems to have been done So far to clarify the points. Normally, however, this constitutional safeguard cannot be very much effective where, as in this Country, parliamentary democracy is not deep-rooted or lacks the tradition of widely accepted political norms.

21. The Career Service in Britain

In Britain the career service of the modern type was organised in 1855, more or less, on a competitive basis. In Prussia the system of selection on merit had been recognised towards the close of the seventeenth century, and the bureaucracy soon became almost a professional class. Merit in pre-war Germany was tested, however, mainly and primarily with reference to the academic qualifications of the candidates. In France there is no central agency for recruitment of the service personnel. Departments recruit officers and men, and make appointments to meet their respective requirements. With some exceptions, the salaries and conditions of service are not regulated by any parliamentary statute in Britain. There are laws preventing certain categories of civil

servants from becoming members of Parliament—a kind of disability analogous to that imposed under our constitution on persons holding any office of profit. Exceptions may be made by legislation enacted by Parliament, as there are exceptions in the case of Ministers under our constitution (article 102). The purpose of the British statutes originally was to reduce the number of persons in the Commons holding offices under royal influence. Now it has become a rigid formula. There are, in addition, Superannuation Acts empowering the Crown to grant pensions.

On the whole, however, the civil service in Britain is regulated by administrative orders such as Orders in Council. The civil service commission, unlike its Indian Counterpart, is set up by such orders, and the commission regulates admission to the service. The Consolidating Order of 1910 has given the Commissioners and the Treasury power to make regulations as to the grading of the service, pay, promotion, age of retirement and other like matters. Appointments to the service are governed by the regulations made by the Commissioners, whereas the classification and conditions of service are controlled by the Treasury Regulations or Orders in Council. It is not by legislation but by administrative action that the mechanism of the service is made to operate. But the agency or agencies of control is or are centralised.

There is stress on academic efficiency in the matter of selection of candidates for entry to the higher cadre of the service, and even to many of the lower posts. The result is that promotion from the lower to higher ranks is rare, so that a sort of immobile caste system exists among the members of the bureaucracy. A civil servant, unless he belongs to the higher administrative cadre, cannot expect promotion, as a general rule, to the exalted office of the permanent secretary to a department of the Government. His records, as a rule, do not count in the assessment of claims to promotion.

One or two Indian examples will illustrate the point. Under the British regime all the highest appointments in the gift of the Crown, including the offices of Provincial

Governors or High Court Judges, were open to members of the Indian Civil Service recruited by the Secretary of State or by the Secretary of State in Council. But members of the provincial or subordinate services were not held eligible for any such appointments except in very rare cases. Again, a secretariat clerk in the lower or upper division, whatever his other qualifications, had no prospect of promotion to the offices of the secretaries to the various departments of the Government. No radical change has since been effected in this rigid 'castè system' inside the services or among their members or holders of other civil posts. It is the British system in action.

22. The Services in US and the 'Spoils'

There is a popular impression in this country that in the US the 'spoils' system prevails in the matter of all appointments to public services and the conditions of tenure. With a change in the Presidency or in the Government, that is, the old set of public servants are made to quit and make room for a new set to suit the political interests of the party in power. This is largely true in the case of the members of the President's Cabinet, ambassadors outside of the career service or certain other officials. But the impression is erroneous, so far as the vast bulk of public servants are concerned.

By the Pendleton Act of 1883, a Civil Service Commission was established. It had a membership of three persons, not more than two of whom could be drawn from the same political party. All appointments were made on the results of competitive examinations and, therefore, on the basis of merit. In the formative stage, a limited number of appointments were made in accordance with this procedure. But during the last fifty years the system of examinations has been extended to a wide area. Public servants hold office during good behaviour. The usual compulsory retirement age is 70 years, but a public servant may retire earlier. No retirement benefits accrue to him under the Federal Government unless he has put in a minimum service of 15 years. When an office or post is

abolished, the holder thereof is given by the Commission an opportunity to choose any other comparable position. All positions are classified, and a five-fold division of the positions has been made by the Classification Act of 1923, such, for example, as (1) professional; (2) sub-professional; (3) CAF [clerical, administrative, fiscal]; (4) CPA [crafts protective, custodial]; and (5) clerical-mechanical.

To improve the machinery and to bring it into line with the diverse needs of a complex society two important steps were taken by President Roosevelt by an executive order dated the 24th June, 1938. For one thing, every major department was required to set up a division of personnel headed by a director. For another, a federal council of personnel administration was established to plan and co-ordinate the work of the civil service commission and the departmental personnel officers. Cooperation with the personnel director of each department and a centralised public service agency ensured 'a wider choice of specialised labour for a particular job requiring professional or technical skill.

Certain American writers claim that the system the US has introduced in regard to the career service has made "public employment a worthwhile life work, with entrance to the service open and attractive to young men and women of capacity and character, and with opportunity for advancement through service and growth to posts of distinction and honour". Emphasis is thus placed on merit, not necessarily assessed in terms of academic efficiency or of position in the cadre, rather than on the trappings of the formal and rigid civil service system. Promotion in the service is determined generally in each case by the chief departmental official. But recourse is being had, now on an increasing scale, to the advice of the departmental promotion board. In the US civil servants may earn eligibility for membership of the President's sub-cabinet.

As a further step towards reorganisation, the federal council of personnel administration was converted, by the order of the President in 1940, into a branch of the civil service commission. It was done with a view to educating

the commission in the needs of the departmental personnel officers. The personnel administration council is no longer a separate agency.

23. Neutrality of Public Servants a Myth

In Britain and in our own country and also, if I am not far wrong, in the US it is claimed that members of the services, defence or civil, have no politics and that, even if they have views of their own on political questions, they are not expected to air them or to take part in political controversies. In many instances they enjoy the franchise like the rest of the citizen body, but they are prohibited by law from participating actively in political management or in political campaign.

It is, of course, admitted that where the conflict between political parties does not reach down to its roots, and conforms to the recognised constitutional norms, as in the case of conflicts between the traditional British or American parties, public servants, on the whole, are disinterested, though inquisitive, spectators of the game. Whatever the results of these contests in Parliament, or in the constituencies, their interests are not in jeopardy. Permanence of tenure, pay and prospects are all guaranteed, whichever party may come to power, because all these traditional parties and the personnel of the services are agreed on the basic essentials of the social order. These parties are resistant to sweeping social changes, and the services are more so than the political parties by training, temperament and in immediate self interest.

But when the conflict is between the possessing class and the dispossessed, between the exploiter and the exploited, between capital and labour, the active sympathy and support of the higher services is on the side of the 'haves'. I know of several highly placed civil servants in India who deny it. They say that they are solemnly pledged to serve the State irrespective of the ideological or political affiliations of the party in power. They will, that is, serve the party of the 'have nots' as faithfully and as conscientiously, as they serve the Congress today, or as they served the British

right up to the year 1947. There are well-known Indian civil servants Who under the British regime vigorously denounced the Congress Party's tactics before American audiences during the last war but Who have been singled out for high official distinction by the Congress Government. What does it prove ? It proves, if it proves anything, that in filling up posts of strategic importance in the administrative mechanism the rulers, whatever their racial composition, search for men who may be safely relied upon in furthering certain social ends. Generally, civil servants of the higher cadres have found the atmosphere of the Congress Government as congenial to their outlook and as helpful to their interests as the atmosphere of the British Government Who had trained them and equipped them with 'specialised' skills.

Are the civil servants, then, so many automatons or marionettes moved about from behind the scene by strings ? If they are, they are, to be sure, not worth the price paid them for their so-called political neutrality. Men and Women Who have no ideas about good or evil—and neutrals hardly, if at all, have ideas—are by no means dependable public servants. But shrewder and more intelligent of these public servants know that they are not neutrals. They are selected after exhaustive scrutiny of their antecedents and connections. They must satisfy the tests not only of professional, technical or academic efficiency but of good conduct and character. By good conduct and character is meant strict conformity to the accepted social or ethical norms.

In the US, the modern *prima donna* of the western democracy, even eminent and distinguished public servants are being 'sacked' on the plea of their alleged un-American activities. The "loyalty checks" and "screenings" which, under the State's special pressure, are spreading to the international civil service of the United Nations Secretariat, show that civil servants can have no right even to private opinions. So American public servants must know what the American way of life stands for, and behave and act conformably to that way. They must have, politics, politics

of a particular kind—the American politics. At the same time they must hate and shun politics too, politics of a different hue or colour—the un-American politics, yes, the Soviet politics. On March 16, 1954, R. A. Butler, Chancellor of the Exchequer, stated in the House of Commons that twentyfour British civil servants had been dismissed on 'security' grounds. Seventeen of them were in industrial branches and seven non-industrial. Butler added that seventytwo civil servants had been transferred to other duties. The number of persons affected is not yet formidable, or even considerable, but the impact of the so-called American way is unmistakable.

Civil servants in our country, particularly of the higher ranks, know that no popular and progressive political party that means business can and would maintain them on emoluments and amenities which keep them apart, in the social scale, from the vast majority of the people. Naturally, their politics is politics of resistance, yes, of resistance to a drastic change in the relations of production. The political neutrality of public servants in our country, in Britain or in the US is a myth, and the crisis of our century seems almost to have exploded it.

24. Public Servants and Labour Unions

There is another very important question that the community will have to face today or in no distant future in connection with public servants. No modern Government prohibit their servants from forming associations. This right is generally recognised. But are they entitled to engage in trade union activities ? If they are, can they go on strike for the purpose of enforcing their economic demands ? In the US there are Government employee unions, and the most important of them are affiliated with the Congress of Industrial Organisations or with the American Federation of Labour. In Britain the issue is somewhat complicated by the rule that a State employee is a servant of the Crown and liable to dismissal by it at any moment. The Crown Proceedings Act has given to any person, who has a claim against the Crown, the right

to sue it without its fiat. It has made the Crown subject to liabilities in tort committed by its servants or agents. But the doctrine that a government servant holds his office during the pleasure of the Crown has not been modified or abolished. That being so, how can the servants of the Crown, it may be asked, engage in trade union activities permissible under the statutes without exposing themselves in law to the risk of summary dismissal by the Crown?

The conditions of service are no doubt regulated by the Treasury. A system of consultation has been provided for the lower-grade employees by the Whitley Councils. Representatives of the organisations of civil servants on these Councils discuss with the "Staff Side", representing the Treasury, their problems and grievances. The Councils are, in no sense, tribunals or arbitration courts; they constitute a consultative machinery. Whatever decisions they may choose to take have no effect unless they are sanctioned by the Cabinet. When they are so sanctioned the Treasury proceeds to implement them. It is not suggested that the Whitley Councils have been of no service in securing certain rights for the servants of the Crown. It is, however, necessary to bear in mind the true nature and functions of the Councils. For some grades of public servants compulsory arbitration has been provided by means of the industrial court, to which the civil service associations have access. Here, again, note must be taken of the limitation to which a decision of the industrial court is subject. The ultimate responsibility in the matter of its implementation rests on the Treasury. The Treasury normally does not ignore the industrial court's awards, but in law the awards are not binding. All these apparent anomalies flow from the doctrine that the Crown's servants are dismissible at any moment except where Parliament by law has specifically modified that doctrine.

In a society in which the functions of the State were very much restricted and the number of public servants comparatively small, the question of their participation in trade union activities was not of great importance. But the political scene has, in recent years, undergone a vast,

sweeping change so that the State is entering upon fields of social activity hitherto not well-developed or outside its control and management. This issue of increasing public importance can no longer be shirked by relying on the old rule that the servants of the Crown hold office during its pleasure.

Apart from the question of liability to dismissal by the Crown at pleasure, which, of course, is subject to statutory provisions in certain respects, British public servants in the industrial field have for some time enjoyed the right, however restricted, to take part in politics. They are entitled to stand for election to Parliament but are required to resign from service after election. In 1949, the restrictions on minor grades of civil servants were removed in accordance with the recommendations of the Masterman Committee. Typists, clerical assistants, some categories of supervisors and scientific assistants are released from the political embargo. Short of membership of Parliament, they may be permitted to engage in all political activities. But members of the higher administrative cadres, that is, those connected with policy, are not free to participate in politics. They may, with permission, take part in activities connected with local government.

Almost the same complication has been introduced in the relations between the Governments in our country, Central or State, and their employees, by adopting from the English law the phrase "during the pleasure", although certain constitutional guarantees as regards the tenure, discipline and conditions of service have been provided. But in these guarantees there is no indication as to whether the employees of the Union or the States have the right to form unions in terms of the relevant statutes relating to industrial disputes, and if they have, whether they can strike work. Nevertheless article 19 (c) confers upon all citizens the right to form associations or unions. Consequently, this is a fundamental right for public servants in so far as they are citizens of India. But this right is subject to a limitation, and it is that it must not be construed as affecting the operation of any

existing law in so far as it imposes, or preventing the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of this right. So the Union Government, a State Government, the Indian Parliament or a State Legislature, on the plea of public security, may, by order or law, impose reasonable restrictions. It is, of course, competent for the Supreme Court or a High Court to examine the reasonableness or otherwise of the restrictions sought to be imposed, and to pronounce judgment thereon.

25. The Meaning of Industrial Dispute

In the case of *D. N. Banerji v. P. R. Mukherjee* (1953) the Supreme Court have dealt exhaustively with the provisions of the Industrial Disputes Act relating to the definitions of 'industry' and 'industrial dispute'. 'Industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workman. 'Industrial dispute' means any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. 'Workman' means any person employed (including an apprentice) in any industry to do any skilled or unskilled, manual or clerical work for hire or reward and includes, for the purposes of any proceedings under the Industrial Disputes Act in relation to an industrial dispute, a workmen discharged during that dispute, but does not include any person employed in the naval, military or air service of the Government. Thus the defence services personnel, whatever their rank or status, are excluded from the purview of the Act.

What about the civil services or the holders of civil posts? The Supreme Court have considered it unnecessary to decide whether disputes arising in relation to purely administrative work fall within the ambit of 'industrial disputes'. After all, as they point out, whether there

is an industrial dispute at all is for the Government primarily to find out. If, in their opinion, a dispute is an industrial dispute, they may refer it for arbitration to a tribunal. A reference to a tribunal by the Government is an administrative act, and it is not for the courts to intervene in such a matter.

The Supreme Court have held, however, that an 'industrial dispute' need not necessarily be confined to a difference or dispute between private employers and their employees in a trade carried on by the employers for profit. It may embrace differences or disputes between the Government and their employees or between a public authority and their employees, and from the point of view of industrial dispute, as distinguished from the income tax point of view, the question of profit is no criterion. The Labour Appellate Tribunal's ruling that the expression "any person" used in the Industrial Disputes Act does not include officers or members of the supervisory staff is open to doubt.

Civil servants of higher grades in this country have their associations which seek redress of their grievances by petition or representation. Servants of lower grades have in a number of cases unions too and, through those unions, carry on trade union activities, for instance, the workers of the railways under State ownership, management and control. If the holders of lower grade posts can form unions, one wonders, why not those engaged in more exalted administrative or other work?

The so-called political neutrality of public servants, their right to form unions and engage in trade union activities to the extent of going on strike for the enforcement of their demands, and similar other questions are bound to assume increasing importance in the complex society of today. For, in such society the State is not only the guardian of law and order but is at the same time the producer of wealth, distributor of the social dividend and planner for reconstruction and rehabilitation.

CHAPTER XII

PARLIAMENT AND STATE LEGISLATURES

1. Anglo-Saxon and Other Systems

The Parliament of the Union of India consists of the President, and two Houses known respectively as the Council of States and the House of the People (article 79). In Bihar, Bombay, Madras, Punjab, Uttar Pradesh and West Bengal, the State Legislature consists of the Governor, and two Houses known as the Legislative Council and the Legislative Assembly. In every other Part A State the Legislature consists of the Governors and the Legislative Assembly (article 168). So far as Part B States are concerned, the legislature consists, in the State of Mysore, of the Rajpramukh and two Houses, and in every other State, of the Rajpramukh and one House only [article 233(7)]. Thus the Anglo-Saxon system is followed in the composition of our Parliament and our State legislatures.

What, then, is the Anglo-Saxon system? According to that system, the head of the State is associated with the, Legislature. For instance, the sovereign law-making authority in England is not Parliament, which consists of the two Houses, namely, the House of Commons elected for five years by popular votes under the Parliament Act of 1911 (section 7) but subject to earlier dissolution, and the House of Lords predominantly manned by hereditary peers and not subject to dissolution. The law-making authority is the King or the Queen in Parliament. On that analogy, the corresponding authority in the Indian Union is not Parliament, but the President and both Houses of Parliament. Similarly, the sovereign law-making authority in a Part A State is the Governor and its Legislature, and in a Part B State, the Rajpramukh and its Legislature.

This differs from the system prevalent in the US or in the USSR. In the US all legislative powers granted to the Centre are vested in Congress consisting of two

Houses, namely, the Senate and the House of Representatives (article 1). The Senate is composed of two senators from each of the fortyeight States, and elected by its people for six years. The electors of each State shall have the qualifications deemed requisite for the electors of the most numerous branch of the State legislature (article XVIII). The House of Representatives is composed of 435 members chosen every second year by the people of the several States. The qualifications of the electors shall be those of the electors of the Senators in each State. No person is eligible for membership unless he has been at least seven years a citizen of the US (article 1).

In the USSR all legislative powers are exclusively exercised by the Supreme Soviet elected for a term of four years (article 36). It consists of two Chambers, namely, the Soviet Union and the Soviet of Nationalities (articles 32 & 33). The Soviet of the Union is elected by the citizens of the USSR according to electoral districts on the basis of one deputy for every 300,000 of the population (article 34). The Soviet of Nationalities, which is the Soviet Union's Second Chamber, is elected by the citizens on the basis of 25 deputies from each Union Republic, 11 deputies from each Autonomous Republic, 5 deputies from each Autonomous Region and 1 deputy from each National Area (article 35).

The Anglo-Saxon system, it may be noted in passing, owes its origin to the ancient idea that all power stemmed from the monarch. The King originally was the symbol of all State authority, including its legislative, executive and judicial powers. He represented also what might be called the principle of perfection. From that comes the theory that the King can do no wrong. From that comes also the theory that the King is the fountain of justice and dispenser of mercy. For some reason or other, our constitution has adopted the British system, although that system has, in the course of centuries, shed many of its old archaic forms. It should, however, be remembered that the President of India, a State Governor and a Rajpramukh are, like the British King or Queen, not members of their respective legislatures but are part of the legislatures.

2. Composition of Parliament and State Legislatures

Elections to the House of the People and to the Legislative Assemblies of States in India are held on the basis of adult suffrage. That means that all adult citizens, male or female, not less than twenty-one years old, have the right to vote (article 326). That right is not accorded to persons who are aliens or are not citizens of this country.

The House of the People consists of not more than five hundred members directly elected by the voters of the States. The States, for the purposes of elections, are divided, grouped, or formed into territorial constituencies. The constituencies into which the State of Assam is divided do not, however, comprise the tribal areas, including the North Eastern Frontier Tract and the Naga Tribal area. The representation in the House of the People of the territories not included within any State and of the Assam tribal areas is determined not by the constitution but by parliamentary legislation (article 81). The Assam tribal areas, incidentally, are administered by the President (Sixth Schedule, para 18).

The number of members allotted to each constituency is so determined that there shall be not less than one member for every 750,000 of the population and not more than one member for every 500,000 of the population. Thus there may be single-member as well as plural-member constituencies for election of members to the House of the People, according to the size of the population of a constituency. The House of the People, unless sooner dissolved, continues for a period of five years. While a Proclamation of Emergency is in operation that period may be extended by Parliament, not exceeding one year at a time. But it cannot in any event be extended for more than six months after the Proclamation has ceased to operate (article 83).

The Council of States, which is the Indian Union's Second Chamber or Upper House, consists of (a) not more than two hundred and thirty-eight representatives of the States, and (b) twelve members to be nominated by the President (article 80). The representatives of each Part A or Part B State are elected by the elected members of the

appropriate Legislative Assembly in accordance with the orthodox method of proportional representation by means of the single transferable vote. For the purpose of filling any seat or seats in the Council of States, allotted to any Part C State or group of such States, there is an electoral college for each such State or group. There is an electoral college for each of the States of Kutch, Manipur, Tripura, Ajmir, Bhopal, Coorg, Delhi and Vindya Pradesh. The States of Bilaspur and Himachal Pradesh are grouped together for the purposes of the electoral college. The election of persons to fill seats in the Council of States is held in accordance with proportional representation by means of the single transferable vote. The members nominated by the President shall be persons having special knowledge or practical experience in literature, science, art and social service. Unlike the House of the People, the Council of States is not subject to dissolution. One third of the members is to retire on the expiration of every second year.

A person is not qualified to be a member of Parliament unless he is a citizen of India. In the case of a seat in the Council of States, the minimum age for a member is thirty years. In the case of a seat in the House of the People, the minimum age is twenty-five years (article 84).

The House of the People is presided over by the Speaker and, in his absence, by the Deputy Speaker. Both are elected by the House. The Council of States is presided over, on American analogy, by the Vice-President, who is elected by members of both Houses of Parliament, assembled at a joint meeting, in accordance with proportional representation by means of the single transferable vote. The Vice-President is the Council's *ex-officio* Chairman. In his absence the Deputy Chairman presides. He is chosen by the Council (article 89).

The Legislative Assembly of a State is composed of members chosen by direct election (article 170). The representation of each territorial constituency is on the basis of the population of that constituency and on a scale, except for tribal areas in Assam, of not more than one member for every seventy-five thousand of the population.

The number of members of a State Assembly shall, in no case, be more than five hundred or less than sixty. As far as possible, the ratio between the number of members allotted to each territorial constituency and the population of the constituency shall be the same throughout the State. The Assembly of a State is presided over by the Speaker and, in his absence, by the Deputy Speaker. Both of them are chosen from amongst its members by the Assembly.

Every State, as one knows, has no second chamber. The total number of members of the Legislative Council, in whatever State it may exist, shall not exceed one-fourth of the total number of members of the Assembly in the relevant State. In no case, however, the number shall be less than forty.

Greater importance seems to have been given to functional representation in the Legislative Council of a State than in the Council of States. There are five elements in the composition of the Legislative Council as against only two in the composition of the Council of States. One-third of the members, for instance, is elected by electorates consisting of members of municipalities, district boards and other prescribed local authorities. One-third is elected by the members of the Legislative Assembly from amongst persons who are not members of the Assembly. One twelfth is elected by electorates consisting of graduates of three years' standing resident in the State. Another one-twelfth is elected by electorates consisting of teachers of three years' standing engaged in educational institutions, not lower in standard than secondary schools. The remainder of the membership, that is, approximately one-sixth, is nominated by the Governor. The Governor is required to ensure that such persons are nominated as have special knowledge or practical experience in respect of such matters as literature, science, art, co-operative movement and social service. The composition of a State Legislative Council may, however, be determined by Parliament by legislation (article 171).

Parliament may by law abolish the Legislative Council of a State where it exists or create a Council in a State

where it does not exist. No such law can be enacted unless the Legislative Assembly of the relevant State passes a resolution to that effect by a majority of the total membership of the Assembly and by not less than two-thirds of the members present and voting (article 169). No law made by Parliament in this behalf shall be deemed to be a constitutional amendment in terms of article 368. Parliament cannot take such a step in the case of the Council of States. The Chairman and, in his absence, the Vice-Chairman presides over a State Legislative Council. Both of them are chosen by the Council from amongst its members. The duration of the life of the Legislature of a State is determined by the same law as is applicable to the corresponding Houses of Parliament. It is also subject to the like reservations.

The President at the Centre and the Governor or Rajpramukh in a State summon and prorogue the House or Houses and also dissolve the Lower Chamber. They have the right to address the House or the Houses assembled together. They may send messages too. At the commencement of each session the President shall address the Houses of Parliament assembled together. The Governor or Rajpramukh has like power in the case of a State Assembly or a State Legislature.

The decisions of these bodies are taken by a majority of votes except where otherwise provided. The quorum at the Centre is one-tenth of the total membership in each House. In the States ten members or one-tenth of the total membership, whichever is greater, constitutes the quorum. In the British House of Commons, incidentally, the quorum, is forty out of the total membership of six hundred and twentyfive.

3. Parliamentary Practice and Procedure

I shall now say a few words about parliamentary procedure. A Bill other than a Money Bill may originate in either House both at the Centre and in the States. In the case of disagreement between the two Houses of Parliament there is provision for a joint sitting of the Houses, and a

decision taken by a majority of members of both the Houses present and voting is effective (article 108). In the States, however, the procedure is different. If a Bill is passed for the second time by the Legislative Assembly in the case of disagreement, and if the Upper House persists in refusing to agree, then the Bill as passed by the Assembly is deemed to have been passed by both the Houses. The Upper House can delay but cannot veto a Bill passed by the Lower House (article 197).

As to a Money Bill, it must be introduced in the Lower Chamber at the Centre as well as in the States (articles 109 & 198). After it is passed by that body, it is transmitted to the Second Chamber for its recommendations. The Upper Chamber is to return it to the Lower Chamber with its recommendations within fourteen days from the date of receipt. The Lower Chamber may accept or reject, in whole or in part, those recommendations. A Money Bill is deemed to have been passed by both the Chambers, whether it is returned or not within the prescribed period of fourteen days.

The expression "Money Bill" has been defined in articles 110 and 199, the first article for the Centre and the second for the States. Both the articles reproduce practically the definition given in the Parliament Act of 1911. The definition deals with both the positive and negative aspects of the content of a Money Bill. For instance, it says that a Bill, affirmatively, is a Money Bill if it contains provisions dealing with such subject or subjects as the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial charges on the consolidated fund, or on money provided by Parliament or the State legislatures, or the variation or repeal of any such charges; the appropriation, receipt, custody; issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof ; or any matter or matters incidental to any of these subjects. It says, again on British analogy, that a Bill, negatively, is not a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or

payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

4. Issues Involved in Money Bills

The expressions 'taxation' and 'borrowing of money' do not, for the purposes of a Money Bill, evidently include 'taxation' and 'borrowing of money' by local authorities or bodies for local purposes so that if a Bill introduced in the House of the People or in a State Assembly contains a provision empowering the Damodar Valley Corporation or the Calcutta Corporation, as the case may be, to impose a particular cess or raise a loan, it should not be deemed to be a Money Bill for the purposes of the definition. Again, if a Bill contains a provision imposing a punitive tax on the inhabitants of a given area, it is not a Money Bill either. Furthermore, if a Bill incorporates a provision concerning any of the subjects included in the definition together with clauses dealing with extraneous subjects, then also it is not a Money Bill. For, it is mandatory that the Bill must contain *only* any or all of the specified matters, or matter or matters: incidental thereto. A composite Bill does not, therefore, appear to be a Money Bill, and should be treated, for legislative enactment, as one other than a Money Bill.

In the budget session of Parliament in 1953, a serious controversy arose between the House of the People and the Council of States over the Speaker's certificate of the Income Tax Bill as a Money Bill. Obviously, it contained matters other than, and not incidental to, those specified in article 110, and it seems that the Speaker as well as the Law Ministry of the Government of India, on whose advice apparently he gave the certificate, did not take into consideration the word 'only' used in the article. They ignored it. If it is intended that the Council of States should have no right to introduce or amend any Bill containing any of the provisions aforesaid, then it is necessary, by suitable amendment of

the provisions, to delete the word 'only', and also to provide, in specific terms, that even a composite Bill, if it contains a provision relating to any of the subjects specified in the definition, shall be deemed to be a Money Bill.

As it is, the Speaker may decline to certify a composite Bill as a Money Bill exactly in the same manner as the Speaker of the British House of Commons has done on several historical occasions. The Finance Bills of the sessions, 1914-16, 1916, 1917-18, 1918, 1921 and 1923, it may be recalled, failed to secure the Speaker's certificate as Money Bills as the provisions contained therein were not confined to the objects specifically mentioned in the statutory definition. For the same reason The Highlands and Islands (Medical Service) Bill was treated on the same footing in 1913. It has been ruled that the inclusion in a Bill of charges for services rendered would prevent it from being considered a Money Bill. To give an Indian example, suppose a Bill introduced in the West Bengal Assembly contains a provision imposing a tax on agriculturists in respect of their use of water from irrigation canals constructed in a given area. It would be perfectly competent for the Speaker to refuse to certify that it is a Money Bill, although it imposes or seeks to impose a burden on the agriculturists concerned.

5. The Speaker's Certificate Justiciable or Not

If any question arises whether a Bill is or is not a Money Bill, the decision of the Speaker thereon is final. Is it final, it may be asked, So far as Parliament or a State Legislature only is concerned ? Or does it also exclude the jurisdiction of the courts ? In Britain a certificate given by the Speaker under the Act is conclusive for all purposes, and cannot be questioned in any court of law (The Parliament Act, 1911, section 2). Before giving a certificate the Speaker is directed to consult, if practicable, those two members of the chairman's panel who are appointed for the purpose at the beginning of each session by the committee

of selection. In this respect, the British law is more definite and clear than the Indian law. There is no room for doubt or confusion, so far as the British law is concerned. The same cannot be said of the Indian law, especially in view of the fact that where the jurisdiction of courts is ousted the constitution provides in certain cases that such and such matter shall not be enquired into in any court (article 163), that such and such matter shall not be called in question in any court (article 329) and so on. A phrase like this should have been inserted if it were really the intention of the Constituent Assembly to oust, as in Britain, the jurisdiction of the courts.

There is, of course, no doubt that, right or wrong, the Speaker's certificate cannot be challenged by the House or by any member thereof. It is also agreed that no suit for injunction against the Speaker is maintainable in any court or that no writ can issue from the High Court against him in respect of acts done by him in his official capacity within the Chamber. But suppose the Speaker certifies a Bill as a Money Bill, which is not really a Money Bill within the meaning of the definition and the Bill is enacted and becomes law after assent has been given by the President or the Governor, as the case may be. Proceedings are then instituted challenging the validity of the law so enacted on the ground that it has not been passed in the form prescribed for the passing of all Bills other than Money Bills, that is, on the ground that the law in question has not been enacted by the legislature competent to enact it. Is it competent for the court to consider the matter and pronounce judgment ? Or are the proceedings not at all sustainable?

Apart from the 'finality' of the Speaker's certificate it is provided that the validity of any proceedings in Parliament or in a State Legislature shall not be called in question on the ground of any alleged irregularity of procedure (articles 122 & 212). The whole issue will turn on the interpretation of the expressions 'final' and 'irregularity of procedure'. Is the protection restricted merely to the internal conduct of business or does it also apply outside? The point raised

is not, however, free from doubt. It is difficult to say definitely that the court has no jurisdiction whatsoever to entertain a suit of this nature, regard being had to the difference in language between our law and the corresponding English law or that between the articles in question and the other articles of our constitution which constitute a positive bar to interference by courts. There shall be endorsed on every Money Bill, when it is transmitted to the Upper House and when it is presented to the President, the Governor or Rajpramukh for assent, the Speaker's certificate signed by him, that it is a Money Bill (articles 110 & 199).

6. Public and Private Bills

In Britain Bills are classified into public Bills and private Bills. Public Bills, again, may be Money Bills or Bills other than Money Bills. Bills for a particular interest or for the benefit of any person or persons are treated in Parliament as private Bills. As Erskine May observes, whether they be for the interest of an individual, of a public company or corporation, or of a parish, city, county, or other locality, they are equally distinguished from measures of public policy; and this distinction is marked in the very manner of their introduction. Every private Bill is solicited by the parties interested in promoting it, and is founded upon a petition which must be duly deposited. A private Bill should not be confused with a public Bill introduced by a private member.

But sometimes it is difficult to maintain this line of distinction. A Bill concerning a city is normally a private Bill, but as it may affect a vast area, a huge population and a large variety of interests it is regarded as involving public policy rather than local interest only. Such a Bill is treated as a 'hybrid' Bill. Similarly, a Bill brought in by the Government of the day and dealing with Crown property, or with national or other works in different localities and at the same time affecting private interest, is introduced as a public Bill but subsequently treated as a 'hybrid' one.

In Britain a Bill, other than a Money Bill, may be introduced in either House of Parliament, and must pass through all its stages in both the Houses. But a Money Bill shall be introduced only in the House of Commons. Legislation involving imposition of taxes or expenditure of public money can be initiated only by the Government. Except as provided by the Parliament Act 1911, the assent of both the Commons and Lords as well as of the Crown to a Bill is necessary for the purposes of statutory enactment. Under that Act, however, legislation may be enacted by the Crown and the Commons in disregard of the Lords. In the case of a Money Bill, e.g., the annual Finance Bill, it may be presented to the Crown for assent without the concurrence of the Lords if the latter fail to pass it within one month after it has been sent to them by the Commons. In the case of any other public Bill, it may also become law with Royal assent only if the Lords refuse in three successive sessions to pass it and if two years have passed between the dates when it was read a second time in the first and a third time in the last of those sessions, whether of the same Parliament or not (sections 1 & 2).

The difference in English law between public Bills and private Bills or between the latter and 'hybrid' Bills is not observed in our constitution. In our country private Bills are non-official Bills introduced by private members, and not by the Government. They may concern any matter, whether involving public policy or private interest or both. If, however, they come within the purview of the definition of Money Bills, they may be introduced, as in Britain, only by the Government. Private members have no right to sponsor them. The principle underlying this rule is that money is required by those charged with the administration, and the responsibility for the administration devolves on the President or the Governor or Rajpramukh, acting directly or through officers subordinate to them.

According to English law and custom, too, every Bill or motion, which in any way creates a charge on the public revenue, must receive the recommendation of the Crown

before it can be entertained by the House. The recommendation having been given, it is referred to the consideration of a committee of the whole House. The principle that the sanction of the Crown must be obtained to every grant of money drawn from the public revenue applies equally to the taxation levied to provide that revenue. Unless a new and distinct charge is imposed upon the public revenue the rules or orders regulating financial procedure are not applicable. A grant of public money may, however, be obtained without the previous signification of the Royal pleasure and against the wishes of Ministers by a motion for a committee of the whole House to consider a resolution for an address to the Crown, asking for the issue of a sum of money for the purposes specified in the motion. Erskine May says that recourse is had, on occasion, to this procedure when a public monument to a deceased statesman is desired.

With certain exceptions, the broad principles of English law and custom have been recognised in our constitution. For instance, the President shall, in respect of every financial year, cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditures of the Government of India for that year (article 112). The estimates of expenditure embodied in the annual financial statement shall Show separately (a) the sums required to meet expenditure charged upon the Consolidated Fund; and (b) the sums required to meet other expenditure. The estimates relating to (a) shall not be submitted to the vote of Parliament but are open to discussion in either House of Parliament. The estimates relating to (b) shall be submitted to the House of the People in the form of demands for grants, and the House has power to assent, or refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein. No demand for a grant shall be made except on the recommendation of the President (article 113). Again, a Bill or amendment making provision for any of the matters concerning a Money Bill shall not be introduced or moved except on the recommendation of the President, and a

Bill making such provision shall not be introduced in the Council of States. No recommendation of the President is, however, necessary for the moving of an amendment making provision for the reduction or abolition of any tax. Furthermore, a Bill, which, if enacted into law, would involve expenditure from the Consolidated Fund of India, shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill (Article 117). Similar provisions have been made for Part A and Part B States (articles 202, 203, 207 & 238).

7. The Committee Procedure

As to the procedure of passing a Bill, the normal rule is that a Bill is presented and given a formal first reading. It is followed by a second reading and a debate takes place on the merits of the Bill and on the policy underlying it. When it receives a second reading it is referred to a committee. In Britain, by the way, a public Bill is referred either to one of the six standing committees appointed by the committee of selection or, in important cases, to a committee of the whole House. In the committee of the whole House the chair is taken by the Chairman of Ways and Means, and not by the Speaker. In committee members may speak, contrary to the practice in Parliament, any number of times and move any relevant amendments.

After the committee stage the Bill, as amended, comes back to the House for detailed discussion. The Bill is then given a third reading, and during debate verbal alterations only are made. It is subsequently passed by the House clause by clause. An indemnity Bill, seeking to protect persons against the consequences of any breach of the law, is proceeded with as an ordinary Bill. But it is usually passed through all its stages at one sitting as being an urgent matter. The method of examining legislation in committees in the US has already been discussed.

In the USSR, at the first session of the Supreme Soviet, each chamber chooses three standing commissions for the purpose of preparing legislative proposals. These are :

(1) the commission for legislative proposals, consisting of ten members in each chamber, and concerned with sponsoring proposals of a general character; (2) the budget commission consisting of thirteen members in each chamber, and concerned with the economic and political aspects of the budget, including estimates of income and expenditure for the year, the various sources of income and the allotment of funds to different items; and (3) the commission for foreign affairs consisting, in the Soviet of the Union, of eleven persons and, in the Soviet of Nationalities, of ten. The last commission makes a preliminary survey of all questions relating to international or foreign relations to be later considered and determined by the Supreme Soviet or its Presidium. Apart from these three commissions, each chamber chooses a credentials commission in accordance with article 50 of the constitution, which is charged with verifying the credentials of each member. When a report is presented by the commission each chamber decides, in each case, whether the credentials so presented should be accepted or whether the election of a member should be set aside.

8. The Law and Practice Relating to Veto

Coming back to our own country, no Bill is a complete enactment unless it is assented to by the President or the Governor or Rajpramukh, as the case may be. As a principle, it may be traced to the ancient English doctrine that legislation must have the concurrence of all the constituent parts of the law-making authority. Hence the assent of the Crown is required for every legislative enactment. Originally, the monarch freely exercised the power to withhold assent from Bills, but the veto has not been exercised in Britain since the reign of Queen Anne, and may be said to have fallen into disuse, although in law the right to annul parliamentary legislation has not been abolished by any statute. That right is now no more than a fiction of the law.

Possible conflicts between the US President and the Congress in the matter of legislation have already been

dealt with. In the USSR the laws adopted by the Supreme Soviet are published over the signatures of the President and the Secretary of the Presidium. The President presides at sessions of the Presidium, signs its statutes, receives accredited representatives of other States and generally looks after the execution of the decisions of the Presidium. The Presidium or the President cannot, however, veto any laws enacted by the Supreme Soviet or send back for reconsideration any statute.

Can the President of India and a State Governor or Rajpramukh veto Bills passed by the relevant legislatures, and if they can, when and to what extent? As regards the Centre, when a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and he declares that he assents to the Bill or withholds assent therefrom. But before doing so, the President may return the Bill to the Houses with a message requesting that they will reconsider the Bill or any of its specified provisions and, in particular, will consider the desirability of introducing such amendments as he may recommend in his message. The Houses shall reconsider the Bill accordingly; and if they pass it again with or without amendment and the Bill thus passed is presented to the President for assent, he shall not withhold assent therefrom (article 111). Thus the president can only suggest amendments or request the Houses to consider whether it would not be proper or expedient to modify the Bill in certain ways and so on; but if the Houses persist in their view, the President cannot intervene by the exercise of veto.

That procedure, however, does not, in its entirety, apply to a Money Bill for the obvious reason that having been introduced in the House of the People on his recommendation the question of his giving thought to the Bill after it has been passed does not arise. The President gives his assent to it as a matter of course as soon as it is presented. It may be that a Money Bill is passed not exactly in the form in which it was introduced by the Government on the President's recommendation.

What happens then ? In such a case a conflict arises between the Ministers and Parliament, particularly the House of the People. Either the Ministers yield to the wishes of the House and advise the President to give his assent to the Bill as passed, or they take the responsibility for advising the President to withhold assent and face the political consequences.

As regards the States, the issue of the exercise of the veto is rather complicated; in any event it is not so simple as that at the Centre. Like the President, the Governor or Rajpramukh declares that he assents to the Bill or withholds assent therefrom. In addition, he can declare that he reserves the Bill for the consideration of the President. Where the Bill is not so reserved, the rule applicable to the Centre applies also to the States, that is, ultimately the Governor or Rajpramukh does not withhold assent from a Bill (articles 200 & 238). So far as a State Money Bill is concerned, the Union procedure in all its implications also applies with necessary or consequential changes.

It seems that the reservation for the President's consideration is of two kinds. First, where a Bill, in the opinion of the Governor or Rajpramukh, would so derogate from the powers of the High Court as to endanger the position which that Court is designated to fill in the mechanism of the State, it is obligatory on his part not to assent to it, but to reserve it for the consideration of the President. Second, the Governor or Rajpramukh may reserve any Bill other than a Bill of this kind. Whenever a Bill, whether of this category or of that, is reserved the President shall declare that he assents to it or that he withholds assent therefrom. But he may direct the Governor or Rajpramukh to return the Bill to the House or Houses, as the case may be, with a message in the form in which, and for the purposes for which, he himself sends messages to Parliament. When a Bill is returned, the House or Houses shall reconsider it within a period of six months from the date of receipt of such message; and if it is again passed

by the House or Houses with or without amendment, it shall be presented again to the President for his consideration (articles 201 & 238). From the language used here, as contrasted with the language used with reference to Bills passed by Parliament and presented to the President, it appears that the President is entitled to withhold assent from all reserved Bills from the States, or to keep them hanging for an indefinite period. Apart from the other provisions of the constitution, particularly those relating to Proclamations by the President, this veto power in the hands of the President over State legislation may be used to undermine the basis of State autonomy.

A Bill pending in Parliament does not lapse by reason of the prorogation of the Houses, neither does a Bill pending in the Council of States and which has not been passed by the House of the People, on the dissolution of the latter chamber. But a Bill which is pending in the House or which, having been passed by the House, is pending in the Council lapses on the dissolution of the House. There is, however, an exception to this rule, and it is that a Bill may be passed at a joint meeting of the chambers summoned by the President in the case of disagreement between the two Houses notwithstanding that a dissolution of the House has intervened since the President notified his intention to summon the Houses at a joint sitting (articles 107 & 108). *Mutatis mutandis* these provisions regarding the lapsing of Union Bills apply to State Bills (article 196).

9. Ordinance-making powers

I shall now deal with the law-making powers of the President and the Governor or Rajpramukh of a State. During the recess of the appropriate legislatures ordinances may be promulgated by them. They are made on the advice of Ministers, unlike those ordinances under the Government of India Act, 1935, which the Governor-General or the Governor could make 'in his discretion'. An ordinance shall have the force and effect as an Act, but must be

within the competence of the legislature concerned. An ordinance must be laid before the relevant legislature. It ceases to be in force on the expiry of six weeks from the re-assembly of the legislature. It goes earlier if the legislature by resolution disapproves of it. The President or the Governor or Rajpramukh of a State, as the case may be, may withdraw it at any time.

In a State, however, no ordinance can be promulgated without instructions from the President if (a) a Bill containing the same provisions would have required the previous sanction of the President for its introduction into the legislature; or (b) the Governor or Rajpramukh would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or (c) an Act containing the same provisions would have been invalid unless, having been reserved for the consideration of the President, it had received his assent. An ordinance, promulgated in pursuance of instructions from the President, shall not be vitiated by reason of its repugnancy to an Act of Parliament or to an existing law with respect to a concurrent subject. It shall be deemed to be an Act reserved for the consideration of the President and assented to by him (article 213). The ordinance-making power, it should be remembered, may be exercised by the President or the Governor and Rajpramukh on the advice of their respective Councils of Ministers only when the relevant legislature is not in session to meet situations which call for immediate and urgent action and upon which decisions cannot be postponed or deferred until the summoning of the legislature.

10. Distribution of Legislative powers

Subject to the scheme of delimitation of subjects and the other relevant provisions of the constitution, Parliament may make law for the whole or any part of the territory of India, and a State legislature may make law for the whole or any part of a State. No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation (article 245). By necessary implication

no State legislation would have extra-territorial effect.

One or two points call for examination at this stage. It has been suggested by some commentators that the phrase "subject to the provisions of the constitution" restricts the powers of Parliament in regard to D territory, or any other territory not included in D territory or in any State. That is wrong, for, Parliament has power to make law with respect to any matter for any part of the territory of India not included in Part A or Part B States notwithstanding that such matter is enumerated in the State List of the Seventh Schedule. It is, of course, true that the President may make regulations in relation to such territory repealing or amending a law made by Parliament. That, however, does not take away the power of Parliament to make laws. The same principle applies to the scheduled and tribal areas. These areas are within the territories of the States, and not, unlike D territory, separate entities. The provisions of the Fifth Schedule apply to the administration and control of such scheduled and tribal areas as are included in any Part A or Part B State other than the State of Assam. For the administration of the tribal areas in Assam the provisions of the Sixth Schedule are applicable.

The next point to consider is the meaning of the phrase "extra-territorial effect". What is meant is the effect of an Indian law outside the territory of the country. The territory of a sovereign country, as a rule, extends to a three-mile sea belt adjacent thereto. In certain instances, a longer distance has been declared within the territorial jurisdiction of a State. The question is dealt with from time to time in international treaties or agreements. The term may include, apart from the open seas, any port, harbour or dock situate within the three-mile limit. The effect of a law within the territorial waters is territorial, and not extra-territorial. Extra-territorial operation begins where the territorial jurisdiction ends.

Suppose a law enacted by Parliament prohibits divorce. It extends to Indian citizens wherever they may be, unless exceptions are made. Suppose, further, the husband of an

Indian woman, resident for the time being in the US, after due notice starts divorce proceedings in an American court. Normally, the American court respects the Indian law, not as part of the law of the US, but as a gesture by way of extending to the Indian law the comity which it extends to the laws of any other friendly State. The American court may not do so, but if it does, as normally it does, the Indian law is said to have extra-territorial effect. Even when a foreign court does not recognise the Indian law as being opposed to public policy or to the principles of natural justice or for any other reason, the courts in India are bound to follow it. An Act is not invalid on the ground that Parliament, which has enacted the law, may find that it cannot be directly enforced; and the municipal courts must, in any event, enforce the law with the machinery available to them.

Subjects for legislation are classified into (1) Union List, (2) State List, (3) Concurrent List, and (4) Residuary, that is, any matter which may not come under any of the three scheduled Lists. In respect of subjects in the Union List Parliament legislates exclusively. Normally, the State legislature legislates exclusively in respect of subjects in the State List. The entries in the Concurrent List fall within the domain of both Parliament and a State legislature (article 246). If, however, a State law in this respect is repugnant to a Parliamentary law, then the latter law prevails to the extent of repugnancy (article 254). The residuary field belongs exclusively to Parliament (article 248). Parliament also legislates with respect to any matter for any part of the territory, not included in Part A or Part B States, notwithstanding that such matter is a matter enumerated in the State List.

Part B States have, more or less, by Instruments of Accession or supplementary agreements, acceded in respect of entries corresponding to those included in the Union List. For historical and other reasons the State of Jammu and Kashmir has held out, so that Parliament can legislate, in relation to that State, in respect only of Defence. Foreign Relations and Communications, and not of any other

matter enumerated in the Union List. The relations between that State and the Indian Union are, for the present, determined, in the main, by the July agreement of 1952, whereby the State retains full autonomy in respect of all subjects except the three matters referred to above. It will be noticed that the Codes and other penal or civil laws do not apply to that State, except in so far as certain provisions thereof have been adopted by its own legislature.

11. Financial Allocations

As in the sphere of legislation and administration, so, too, in the matter of distribution of revenues between the centre and the units, the principle followed, broadly speaking, is supposed to be one of federalism with strong unitary bias. The scheme is, on the whole, a legacy of the British regime in its last phase, almost a rehash of the arrangements made under the Government of India Act, 1935, as would be clear from the Seventh Schedule read with Part XII. It is a kind of financial dyarchy with the main power-house kept under the control of the Union.

The features of the scheme of distribution are briefly described. First, certain taxes as, for example, customs duties, duties of excise (with certain exceptions) and corporation tax, are levied and collected by the centre, and the entire proceeds from these taxes go to the centre (Seventh Schedule, Union List, entries 83-85). Second, certain taxes as, for example, land revenue and taxes on agricultural income, are levied and collected by the units, and the entire proceeds from these taxes go to the units (State List, entries 45-46). Third, certain taxes as, for example stamp duties and duties of excise on medicinal and toilet preparations as mentioned in the Union List are levied by the centre but are collected by the units, and the proceeds are allocated to the units (article 268). Fourth, certain taxes as, for example, duties in respect of succession to property other than agricultural land, are levied and collected by the centre, but the proceeds from these taxes are assigned to the units (article 269). Fifth, certain taxes as, for example, union duties of excise, other

than duties of excise on medicinal and toilet preparations previously mentioned, are levied and collected by the centre, but the proceeds from these taxes are paid wholly or in part to the units (article 272). Sixth, certain taxes as, for example, taxes on income other than agricultural income, are levied and collected by the centre, but the proceeds from these taxes must be distributed between the centre and the units (article 270).

Besides, provision has been made for grants-in-aid of the revenues of Assam, Bihar, Orissa and West Bengal, in lieu of a prescribed share of the proceeds from export duty on jute and jute products (article 273). There is special provision for grants-in-aid of the revenues of Assam. For development purposes grants-in-aid of the revenues of the States generally are provided for. Furthermore, Parliament may by legislation provide for grants-in-aid of the revenues of such States as may be in need of assistance (article 275). The Union may conclude an agreement with any Part B State with regard to the levy, collection and allocation of any tax or duty as well as with regard to any financial assistance (article 278). During a financial emergency, however, the Union may direct any State to observe such canons of financial propriety as may be specified in the direction (article 360). Moreover, while a Proclamation of Emergency is in operation the President may direct that for a specified period the financial allocations as contemplated in the constitution shall have effect subject to such exceptions or modifications as he thinks fit (article 354).

12. The Finance Commission's Recommendations

The constitution requires the President to constitute a finance commission within two years from the commencement, and thereafter at the expiration of every fifth year or earlier (article 280). The commission is to make recommendations to the President as to (1) the distribution between the Centre and the States of the net proceeds of the divisible taxes or duties; (2) the allocation between the State of their respective shares of such proceeds;

(3) the continuance or modification of the terms of any financial agreement entered into between the Union and a Part B State; and (4) any other matter that may be referred to it by the President in the interest of sound finance. The President shall cause every recommendation of the commission together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament. The commission is to consist of a chairman and four other members. They are appointed by the President.

The recommendations of the first commission appointed under the constitution, and the explanatory memorandum are now before the country. First, the States' share of the net proceeds of income tax is 55 per cent which is distributed as follows: Assam 2.25; Bihar 9.75; Bombay 17.50; Hyderabad 4.50; Madhya Bharat 1.75; Madhya Pradesh 5.25; Madras 15.25; Mysore 2.25; Orissa 3.50; PEPSU 0.75; Punjab 3.25; Sourashtra 1.00; Travancore-Cochin 2.50; Uttar Pradesh 15.75; and West Bengal 11.25. The percentage deemed to represent the share of Part C States has been fixed at 2.75. The commission, it appears, have recommended an increase of 5 per cent only, in the pre-existing allocations to the States.

The principle of allocation among the States has been determined with reference to (a) the relative collections of the States, and (b) their relative populations according to the census of 1951. The main determining factors, in other words, are (a) contributions, and (b) a general measure of the needs furnished by the population. Twenty per cent of States' share of the divisible pool is to be assigned with reference to the collections from the States whereas eighty per cent is to be allocated on the basis of population of each State. Thus a State, say, Uttar Pradesh, whose contributions to the proceeds of income tax are much less than that of West Bengal, is given 15.75 per cent as against West Bengal's 11.25 per cent of the States' share of the pool.

Second, more than 40 per cent of the net proceeds of the Union duties of excise on tobacco (including

cigars and cigarettes), matches and vegetable products is to be distributed among Part A and Part B States, except the State of Jammu and Kashmir, in proportion to their population. Third, grants-in-aid each year for the transitional period by the Union to Assam (Rs. 75 lakhs) ; Bihar (Rs. 75 lakhs) ; Orissa (Rs. 15 lakhs); and West Bengal (Rs. 150 lakhs), in lieu of their respective shares of the export duty on jute and jute products, are provided for. Fourth, provision is made for additional grants-in-aid by the Union to Assam (Rs. 100 lakhs) ; Mysore (Rs. 40 lakhs) ; Orissa (Rs. 75 lakhs) ; Punjab (Rs. 125 lakhs) ; Sourashtra (Rs. 40 lakhs) ; Travancore-Cochin (Rs. 40 lakhs) ; and West Bengal (Rs. 80. lakhs). Fifth, for the purpose of expanding primary education special grants-in-aid by the Union are recommended for the next four years on a gradually rising scale for the States of Bihar, Madhya Pradesh. Hyderabad, Rajasthan, Orissa, Punjab, Madhya Bharat and PEPSU.

In making their recommendations the commission claim to have kept three main considerations in view. First, the additional transfer of resources from the Union must be such as it could bear without undue strain on its resources, regard being had to its responsibility for such vital matters as the defence of the country and the stability of its economy. Second, the principles involving the distribution of grants-in-aid must be uniformly applied to all the States. Third, the scheme of distribution should attempt to lessen the inequalities between the States.

It must not be forgotten that the commission could not go beyond the terms of reference, or make recommendations inconsistent with the pattern of distribution set by the constitution. Nevertheless it is clear, on their own admission, that the paramount considerations that have weighed with them are those of a 'defence' economy. And when a country's policy is dominated by such economy, the claims of social services and of moral and material development of its people cannot be given the weight they deserve. Again, the priority given to a State's population as compared to its contributions

in determining its share of the proceeds from income tax is based on considerations which are not free from controversy.

13. The Financial Autonomy of States Restricted

It should be noted that the Union or a State may make any grants for any purpose, notwithstanding that the purpose is not one with respect to which Parliament or the State legislature may make laws (article 282). This provision is reproduced from sub-section (2) of section 150 of the Government of India Act, 1935. But nothing like the provision as contained in sub-section (1) of that section finds place in the present constitution, so that there is no bar, as under the old Act, against burden being imposed on the revenues of the Union or of a State for the purposes other than those of India or of some part of India. Under the repealed statute no grant could be made, say, to a university in Nepal or in Afganistan, whereas nothing prevents the Government of India or a State Government to day from making such grant now.

It would not be out of place here to say a few words about the powers of borrowing conferred by the constitution on the Union and the States. The Union Government may raise money in India or outside by loans on the security of the central consolidated fund, but within such limits as may, from time to time, be fixed by law by Parliament. But a State Government cannot borrow outside the territory of India. They may float loans within India on the security of their own consolidated fund, but within limits fixed by State legislation. Within limits and subject to conditions laid down by parliamentary legislation, the Union Government may make loans to any State or give guarantees in respect of loans raised by any State.

Normally, a State Government may raise loans on their own initiative and without central intervention. But they cannot do so without the Union Government's consent if there is still outstanding any part of a loan which has been made to them by the Union Government or by their predecessor Government, or in respect of which a

guarantee has been given by the Union Government or their predecessor Government. Consequently, a State's power to raise loans is, in fact, very much restricted, having regard to its meagre resources under the general scheme of financial distribution as compared to its ever-increasing social responsibilities (articles 292-293). These provisions coupled with those relating to the scheme and method of distribution of revenues, which in the main are reproduced from the Government of India Act, 1935, leave little initiative or freedom to the States. Throughout the capitalist world in this and similar other ways a federal structure, in form, may be and is, in reality, transformed into a unitary Leviathan.

14. Three Kinds of Proclamations

While a Proclamation of Emergency is in operation Parliament has power to make laws for the whole or any part of territory of India with respect to any matter in the State List. If the President is satisfied that an emergency exists, whereby the security of India or any part thereof is threatened, whether by war or external aggression or internal disturbance, he may by Proclamation make a declaration to that effect. A Proclamation may, however, be made before the actual occurrence of war, or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof. In the case of the State of Jammu and Kashmir, the President cannot make a Proclamation of Emergency in the event of internal disturbance or of its imminent danger. There it is exclusively a State matter.

It appears that three kinds of Proclamation are contemplated under the constitution. The first is a Proclamation of Emergency (article 352). The second is a Proclamation in the case of failure of constitutional machinery in a State made by the President on report to that effect from the Governor or Rajpramukh, as the case may be. He may also make this Proclamation on the advice of his Ministers (article 356). The third is a Proclamation which the President, again, may make if he is satisfied that

the financial stability or credit of India or any part of India is threatened (article 360).

The first, that is, a Proclamation of Emergency, contrary to popular belief, may be of indefinite duration, if before its expiration it has been approved by resolutions of both Houses of Parliament. The third, that is a financial or credit emergency Proclamation may also be of indefinite duration. In the matter of duration, therefore, the same law, applies to the third kind of Proclamation as it applies to the first kind of Proclamation. But the law as regards the second kind of Proclamation, that is, a constitutional breakdown Proclamation contemplates that in no case shall it remain in force for more than three years.

One must not make any confusion with respect to these three kinds of Proclamations. Some commentators appear to think, that all these three kinds of Proclamations are Emergency Proclamations. That view is wrong. According to article 366(18), "Proclamation of Emergency" means a Proclamation issued under clause (1) of article 352. Evidently, the Proclamations contemplated under articles 356 and 360 are excluded from this definition. The confusion seems to have arisen from the main heading of the Part—"Emergency Provisions".

There is another point of difference which one would do well to remember. While a Proclamation of Emergency is in force, the President may by order suspend the enforcement by the appropriate court or courts of any of the Fundamental Rights as guaranteed in Part III of the constitution. No such effect flows from the second and third kinds of Proclamations. But the broad effect of each of these Proclamations is generally the suspension, in part or in whole, of State autonomy. These afford an opportunity to the Union, should it so desire, to assume extraordinary powers over the whole of India or any part of India in legislative matters no less than in administration.

15. Limitations on the States' Power to Tax Sales

Generally speaking, trade, commerce and intercourse throughout the territory of India shall be free. But in

public interest Parliament may by law impose restrictions on such freedom. In doing so, however, Parliament shall have no power to make a law discriminating between one State and another unless such discrimination is declared to be necessary for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. It is open to a State legislature by law to impose, on goods imported from other States, any tax to which similar goods manufactured or produced in the State are subject, without making any discrimination between the indigenous goods and the goods imported from other States. It may further impose such reasonable restrictions on the freedom of trade, commerce and intercourse with or within itself as may be required in public interest. Public interest, in given circumstances, may, for example, demand that rice must not be moved out of a particular State to another State or from one district to another district within the State itself. In such a situation the power to impose restrictions by law may be exercised by a State legislature. But no Bill or amendment in this regard can be introduced or moved without the previous sanction of the President (articles 301-305). All doubt about central control in these respects is removed by the provision that Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of articles 301-304. and confer on the authority so appointed such powers and such duties as it thinks necessary (article 307).

So far as Part B States are concerned, if there is agreement between the Government of India and the Government of a State, the levy, imposition or collection of any tax or duty on the import of goods into that State from other States or on the export of goods from that State to other States may be continued in accordance with previous practice, subject, however, to the terms of the agreement and for such period, not exceeding ten years from the commencement of the constitution, as may be specified in the agreement. The President may, after consideration of the report of the finance commission,

terminate or modify any such agreement at any time after the expiration of five years from the commencement (article 306).

A State cannot make a law imposing, or authorising the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State; or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India. Except in so far as Parliament may by law otherwise provide, the same restriction applies to a State law where the sale or purchase of any goods takes place in the course of inter-State trade or commerce.

16. The Supreme Court's Rulings on "Import Export" Clause

The question of interpretation of the "import-export" clause was canvassed before the Supreme Court in the case of *The State of Travancore-Cochin and others v. The Bombay Company Ltd, Alleppey (1952)*. The Supreme Court have held that sales and purchases which themselves occasion the export or import of the goods, as the case may be, out of or into the territory of India, come within the exemption under article 286 (i)(b). A sale by export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and the resultant export form parts of a single transaction. Assuming that the property in the goods passed to the foreign buyer and the sales were thus completed within the State before the goods commenced their journey, the sales must nevertheless be regarded as having taken place in the course of the export and are not, therefore, liable to any tax by the State.

Reference was made, in the course of the debate at the bar, to article 1, sections 8(3), 9(5) and 10(2) of the US Constitution, and to the various American decisions

bearing on those subjects. It was argued on behalf of the appellants that according to those decisions, the State's power of taxation was excluded only when the goods entered the "export stream" and that until then such goods formed part of "the general mass of property in the State", subject, as such, to its taxing power. The Supreme Court have held that the provisions of the US Constitution and the decisions of the American courts are not relevant to the issue raised in the appeal before them.

But a distinction must nonetheless be made, not only from the legal standpoint but also from the standpoint of the principles of federal finance, between a contract of sale, which has as its object the export of goods from the country, and a contract of sale of the same goods, which is not directly and immediately connected with export. Suppose the Birla Brothers buy a certain quantity of burlap from a manufacture in the country for export and then sell it to a buyer abroad. The first transaction, that is, the contract for purchase for export is a home transaction, whereas the second, that is, the contract for sale abroad is an export transaction. The home transaction attracts the operation of the Sales Tax by the State concerned but the export transaction is exempt from such tax and, on the contrary, comes under the purview of the Union export duty.

That view appears to have been taken by the Supreme Court in a subsequent case (*The State of Travancore-Cochin and others v. The Shanmugha Vilas Cashewnut Factory, Quilon and others*, 1953). The position is this : Sales by export and purchases by import attract the operation of article 286(1)(b) and are not liable to the sales tax by a State. But the exemption contemplated in that article does not extend to purchases in the State by the exporter for the purposes of export, or to sales in the State by the importer after the goods have crossed the customs frontier. As the Supreme Court point out, a purchase for export is not a transaction so integrated with export that the former could be regarded as done 'in the course' of the latter. The same consideration

applies to the first sale after import which is a distinct local transaction effected after the entry of the goods into the country has been completed, and which has no integral relation with import as such. The Supreme Court's ruling in the second case seems a sounder proposition of law than that in the first although they deny that there is inconsistency between the two. Whether the one is or is not inconsistent with the other, the ruling in the first case left the issue of the States' power to tax under the "import export" clause in doubt.

17. Privileges of Parliament and Legislatures

As regards the powers, privileges and immunities of Parliament, the State legislatures and members of Parliament and the State legislatures, there is freedom of speech on the floor, subject, however, to the provisions of the constitution and to the rules and standing orders regulating the procedure. Again, no member is liable to any proceedings in any court in respect of anything said or any vote given by him in the appropriate House or any committee of the House. Further, no person, whether member or not, is, liable in respect of the publication by or under the authority of the House concerned of any report, paper, votes or proceedings.

In other respects, the powers, privileges and immunities of each House of parliament, of each House of a State legislature and of the members and committees of each House shall be those of the British House of Commons and of its members and committees until provision determining such powers, privileges and immunities has been made by Parliament and the legislature of a State, as the case may be. All these provisions apply in relation to persons who have the right to speak in, and otherwise to take part in the proceedings of Parliament, a State legislature and their committees as they apply in relation to members (articles 105 & 194).

The freedom of publication of proceedings as provided for in our constitution deserves special notice. Suppose the proceedings contain a defamatory statement against some

person. Publication of such proceedings without the authority of the House is not protected. Suppose a member made a speech which ordinarily attracted the operation of a penal law, and then he broadcasts, on his own initiative and without the authority of the House, reprints of that speech in his own constituency or elsewhere. He is liable in law.

What is permissible within the Chamber is not necessarily protected outside so that, subject to the presiding officer's ruling, a member may say whatever he likes but has no right, by virtue of that freedom, to publish his offensive speech without the authority of the House. Without that authority even publication, whether in the columns of a newspaper or elsewhere, of a faithful and accurate report of the proceedings does not seem to be protected under our constitution.

18. British Law and Practice

It appears that in this respect the law and custom in Britain gives wider and more substantial freedom than our constitutional provisions, and, be it noted, so far as this right is concerned, the principles of English practice as enunciated by the courts from time to time do not in their entirety apply here. There is little doubt nevertheless that the idea of our law-givers has been borrowed from the Commons Order of 1641, which read : "That no member shall give a copy, or publish in print anything that he shall speak here, without leave of the House," and "that all the members of the House are enjoined to deliver out no copy or notes of anything that is brought into the House, or that is propounded or agitated in the House". Since then many changes have occurred in Britain in consequence of statutes as well as of judicial decisions.

There was that famous case of *Stockdale v. Hansard* (1839), in which the Court of the Queen's Bench decided (1) that only the King and both Houses of Parliament could make laws; (2) that no resolution of any one House of Parliament should place any one beyond the control of the law; (3) that where it was necessary to decide the rights of individuals in matters arising outside Parliament it

was open to the courts to determine the nature and existence of the privileges of the House of Commons; and (4) that the House could not claim privilege of the publication of defamatory matter outside.

The Parliamentary Papers Act of 1840, followed, and it was thereby laid down that proceedings in respect of defamatory matter contained in a publication made by or under the authority of either House would be stayed on the production of a certificate from an officer of the House. The Act protected the publication of fair and accurate extracts from papers published by or under the authority of the House. In 1868 it was decided in *Wason v. Walker* that the publication of a fair and accurate report of the proceedings of Parliament was not liable to any court proceedings. On the contrary, the publication of detached parts of proceedings or of a single speech with a view to causing injury to individuals was not privileged. It was also ruled in 1857 in *Davison v. Duncan* that no proceedings lay against the *bona fide* publication of a speech by a member for the information of his constituents.

As Erskine May shows, the action arising out of the case of *Harlow v. Hansard* was stayed in 1845 on the production of the Speaker's certificate. Again, in 1874, the jury was directed in the case of *Houghton and others v. Plimsoll* that the report of a Royal Commission, presented to Parliament in a printed form, came within the protection of the Parliamentary Papers Act since it was a report which had been adopted by Parliament and whose circulation had been ordered by Parliament. The ruling in this case was followed in *Mangena v. Edward Lloyd Ltd.*, in 1908. It was an action for libel brought in respect of a statement contained in an extract from a paper presented to Parliament. In our country the authorisation of the House must be definitely proved to sustain freedom of publication of even a faithful and accurate report of the proceedings or of extracts from the proceedings. That is the law as it stands, but it may be that the courts will interpret it liberally and refuse to take any action against a *bona fide* publication.

The privileges of Parliament in Britain include (i) the its own constitution; (ii) the right to regulate its proceedings; (iii) the right to exclude strangers; (iv) the right to prohibit publication of its proceedings; (v) freedom of speech on the floor; and (vi) freedom from arrest for 40 days before and after session except for treason, felony, breach of the peace, seditious libel and criminal contempt of court. Our legislatures cannot, of course, regulate their own constitutions since they are determined by the constitution itself. But some other privileges the legislatures and their members enjoy partly under the constitutional provisions and partly in view of the rule that the privileges and immunities of the House of Commons shall apply pending competent legislation.

19. Indian Legislatures' Power to Imprison and Fine in Doubt

But the difficulty arises with regard to the question as to whether the Indian legislatures possess powers of committal. Some of them have betrayed oversensitiveness in the matter of alleged contempt of themselves. Are they legally right? Or are they trying to exceed the powers conferred upon them by or under the constitution, and showing a zeal worthy of a better cause? It seems that a point of primary importance is not taken due notice of in this country. The British Parliament, unlike our legislatures, is not the creature of a written constitution susceptible of judicial adjudication, and the statutes which apply to it have themselves been enacted by it and are repealable at its pleasure by the ordinary process. Again, the House of Lords, apart from its legislative powers, possesses judicial powers as the highest court of appeal in the realm. It is a court of record and, as such, has successfully established the right not only to imprison, but to impose fines in respect of breaches of privilege.

Whether the House of Commons, as Erskine May observes, is, in law, a court of record it would be difficult to determine. For, this claim, once firmly maintained, has latterly been virtually abandoned, although never distinctly

renounced. In the case of *Jones v. Randall* Lord Mansfield said that the House of Commons was not a court of record. Nevertheless purporting to act as a court of record the House had formerly imposed fines and imprisoned offenders for a certain time. As a matter of practice, no period of imprisonment is named by the Commons. The result is that prisoners committed by it, if not sooner discharged by itself, are immediately released from their confinement on a prorogation, whether the fines imposed have been paid or not. If they are held longer in custody, the courts may intervene and discharge them on a writ of *habeas corpus*. No confusion should be made between adjournment and prorogation, and in the case of adjournment the prisoners are not discharged from custody.

But even in Britain the issue of privilege, so far as the House of Commons is concerned, is not free from doubt. There is, of course, no controversy as to its exclusive jurisdiction over all its internal proceedings. Apart from the ruling in *Bradlaugh v. Gosset*, reaffirmed so recently as in 1935 in *The King v. Graham*, this point has never been challenged in knowledgeable circles. But the question has not yet been conclusively settled as to whether the House of Commons is a court of record and, as such, has power not only to imprison, but to impose fines. The court may regard the question of privilege as any other point of law and proceed to define the jurisdiction of the House.

Suppose in a particular case the court gives an adverse judgment against the Commons in this regard. Can such a judgment be prevented, overruled or resisted? Yes, it may be reversed by the House of Lords as the highest court of appeal, and in such a case one House (the House of Lords), contrary to the law and custom in Britain, would be the final judge of the privileges claimed by the other (the House of Commons). Accordingly, sometimes the Commons have viewed all legal proceedings, in derogation of their authority, as a breach of privilege and contempt. They have now and then restrained suitors and their counsel by prohibition and punishment and imprisoned the judges. And yet there is no solution.

Assertions of privileges may be made in the House of Commons but denied by the courts. The officers who execute the orders of the House are exposed to legal proceedings. If verdicts are obtained against them, the damages and costs will have to be paid. A continuous state of conflict may ensue, involving the entire machinery of the State and shaking it to its foundations. Therefore, the issue, it has been suggested by experts in Britain should be placed beyond any shadow of doubt by statutory enactment.

It would, I contend, be a far more risky business if our legislatures, relying on the House of Commons, right of committals for contempt, proceed to assert a privilege which the courts may quite legitimately deny and which the public will certainly resent and resist. Already in Dinshaw Mistri's case it has been held, quite rightly, if I may say so with respect, that the power of a State legislature to commit for contempt and, therefore, to detain a person must be subject to Part III of the constitution, and that neither the Speaker nor the legislature can claim protection. The legislature may take all action to ensure that the internal conduct of its proceedings is not interfered with. It does not mean that it has power to set at naught the law of the land, especially the provisions of the constitution. Thus a line of distinction must be drawn between preventive action and punitive action.

What is said here about a State legislature applies equally to both the Houses of the Union Parliament. I may give an instance. Suppose the Speaker of the House of the People orders the expulsion of a member. The member refuses to leave his seat. Action is then taken, under the Speaker's authority, to remove him by force. In the process the member offers resistance. In meeting resistance the sergeant so manhandles the member that he dies. Can the court be seized of a matter like this? Or can the Speaker issue a certificate for production before the court to the effect that it was an internal affair of the House, and that the court cannot, therefore,

interfere ? There is nothing in our constitution preventing the court from taking cognizance of the matter. The facts and circumstances of "manhandling" by the sergeant will be gone into by the court in deciding the case on merits, but neither the Speaker nor the House has power to restrain the court from proceeding with the matter.

20. Parliament and State Legislatures are not Courts of Record

In our country reliance is placed, much too mechanically, on English law and custom, and the case of *Bradlaugh v. Gosset* is frequently cited in support of the claim that our legislatures have all the powers of the British House of Commons. It is true that in that case Stephen affirmed the principle that the House of Commons had the exclusive power of interpreting a statute "so far as the regulation of its own proceedings within its own walls is concerned ; and that even if that interpretation should be erroneous, this court has no power to interfere with it directly or indirectly". He stated further that "a resolution of the House, permitting Mr. Bradlaugh to take his seat on making a statutory declaration, would certainly never have been interfered with by the court", and that "if we had been moved to declare it void, and to restrain Mr. Bradlaugh from taking his seat until he had taken the oath, we should undoubtedly have refused to do so".

I But that is not all. The judge added a significant proviso. He, declared that "on the other hand, if the House had resolved ever so decidedly that Mr. Bradlaugh was entitled to make the statutory declaration instead of taking the oath, and had attempted by resolution or otherwise to protect him against an action for penalties, it would have been our duty to disregard such a resolution, and, if an action for penalties were brought, to hear and determine it according to our own interpretation of the statute."

It is not suggested that Stephen's interpretation has been uniformly followed in Britain, and for that reason Erskine May has felt constrained to refer to conflicting

opinions as to the limits of parliamentary privilege set against the jurisdiction of the courts of law (*Parliamentary Practice*, p. 140). But it is clear from Stephen's judgment in this case that he drew a line of distinction between the legitimate field of parliamentary action and the field where the courts enter as of right. Therefore, in the event of a member being killed in the process of removing him from the Chamber, the position seems to be that in the exercise of his power to regulate the internal conduct of the House the Speaker has the right to order removal of a member but that if, in the process of removal, the law of the land is violated the court has power to intervene and to hear and determine an action for penalties.

That point apart, had the Constituent Assembly intended that our legislatures, Central and State, would have the power to imprison and to impose fines in respect of alleged breaches of privileges or contempt, they would have provided that the legislatures were courts of record, and as such had the power to punish for contempt of themselves, as they have done in the case of the Supreme Court and the High Courts. Perhaps it would not be far wrong to conclude from this deliberate omission that it was not contemplated that our legislatures would possess and exercise these powers.

21. Parliamentary Practice in US and USSR

In the US each House of the Congress is judge of the elections, returns, and qualifications of its members. It may be authorised to compel the attendance of absentee members, in such manner, and under such penalties as the House may provide. Incidentally, it should be noted, the majority of the House constitutes a quorum to do business, unlike the law and custom in Britain and our own constitutional provisions in this regard. Each House may determine the rules of its proceedings, punish its members for disorderly behaviour, and with the concurrence of two-thirds, expel a member. Each House keeps a journal of its proceedings, and publishes the same from time to time

except such parts thereof as may, in its judgment, require secrecy. Neither House, during the session of the Congress, can, without the consent of the other House, adjourn for more than three days, nor to any other place than that in which "the two Houses shall be sitting". [article 1, section 5 (1) (2) (3) (4)].

In all cases except treason, felony, and breach of the peace senators and representatives are privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same. They cannot be questioned in any other place for any speech or debate in either House [(article 1, section 6 (1))]. Similar provisions have been incorporated in the State constitutions. Being judge of elections, returns and qualifications of members, the legislature, and not the courts or tribunals, decide the contested election cases. Standing committees on privileges and elections deal with these cases, and on these committees, as on others, the party in power has the majority.

In the USSR the credentials of members of each House of the Supreme Soviet are verified by the credentials commission elected by the House concerned. On the recommendation of the commission the appropriate chamber in each case decides either to endorse the credentials or to annul the election of the deputy (article 50). So the courts or tribunals have no jurisdiction in the matter. Again, a member of the Supreme Soviet cannot be prosecuted or arrested without its own consent, and when it is not in session, without the consent of its Presidium (article 52). Further, the Supreme Soviet, when it deems necessary, appoints commissions of enquiry and investigation into any matter. It is the duty of all institutions and public servants to comply with the demands of these commissions and to submit to them all necessary materials and documents (article 51).

It is clear that there is no possibility of conflicts of jurisdiction as to privilege, contempt and things of that sort arising in the USSR, as they have arisen in Britain in her long and chequered history, or as they may arise in our country, unless the issue is clinched by definite

statutes. The final authority belongs to the Supreme Soviet and, while it is not in session, to its Presidium. All organs of authority, judicial, administrative or other, are subordinate to the socialist law, issued exclusively by the highest organ of power, namely, the Supreme Soviet. There is no recognition in the USSR of a concurrent or parallel authority with the Supreme Soviet. There is no emphasis, as in the constitutions based on private property relations, on the expensive and vexatious technicalities of law and procedure and on other possible conflicts of jurisdiction arising out of the so-called doctrine of the separation of powers.

22. Constituencies and Voters in India

I shall now deal with the constituencies and voters. No person other than a citizen of India may exercise the right of franchise or is eligible for membership of a House of the Legislatures, Central or State. These are valued political rights, at least in a formal way. In no country are these rights thrown open, except in special cases, to men and women who are not its citizens. But every citizen cannot vote or offer himself as a candidate for election to a Legislative Chamber. And why? Because the law prescribes that he must be an adult. He must, that is, have reached at least twenty-one years of age. Even if one is an eligible voter, one is not necessarily an eligible candidate for membership of any House of the Legislature. For the minimum age prescribed for membership of the House of the People or a State Legislative Assembly is twenty-five years. It is thirty years in the case of membership of the Council of States or a State Council. The minimum age prescribed for the President, as you have seen, is thirty-five years. That is also the minimum age of eligibility for appointment as a State Governor.

Citizenship and age qualifications, again, do not entitle a person to be registered as a voter in a constituency. An adult citizen is disqualified for registration if he is of unsound mind and stands so declared by a competent court. He is not eligible for registration if he is disqualified

from voting under any law relating to corrupt practices and other offences in connection with elections. Further-more, a citizen is not eligible for registration as a voter unless he has been ordinarily resident in a constituency for not less than one hundred and eighty days during the qualifying period. A citizen is deemed to be ordinarily resident in a constituency if he ordinarily resides in that constituency or owns, or is in possession of, a dwelling house in that constituency. Thus for the purposes of eligibility as a voter or candidate for membership a person must be (i) a citizen, (ii) an adult, (iii) not disqualified by reason of unsound mind, undischarged insolvency, or corrupt practices and other election offences, and (iv) ordinarily resident in the constituency.

There is one electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State. No person can be excluded from any such roll or can claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them (article 325). Thus for the first time in India separate electoral registers on grounds of religion, race, caste, sex or any of them have been abolished. This provision underlines not only the principle of equality, at least in a formal way, among individual citizens but also the secular character of the Indian Union.

23. Special Provisions for Scheduled Castes, Scheduled Tribes and Anglo-Indians

Seats are, however, reserved in the House of the people for (a) scheduled castes; (b) scheduled tribes, except the scheduled tribes in the tribal areas of Assam; and (c) the scheduled tribes in the autonomous districts of Assam (article 330). Seats are also reserved for these castes and tribes, except the scheduled tribes in the tribal areas of Assam, in the Legislative Assembly of every Part A or Part B State (article 332). The number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats as the

population of the castes and tribes concerned bears to the total population. This rule applies both to the House of the People and the Legislative Assembly of every Part A or Part B State. Suppose the castes and tribes, for whom seats have been reserved, form one-twentieth of the total population in a constituency. Then the number of seats so reserved shall, as nearly as possible, be one-twentieth of the total number of seats. The scheduled castes and scheduled tribes have been specified by order issued by the appropriate authority.

No seats are reserved for Muslims, Indian Christians or the Anglo-Indian community. As regards the Anglo-Indian community, provisions have, however, been made for their representation in certain circumstances. For example, if the President is of opinion that the Anglo-Indian community is not adequately represented in the House of the People, he may nominate not more than two members of that community to that House. A similar power has been conferred on the Governor or Rajpramukh of a State in the matter of representation of that community in the Legislative Assembly of that State. If the Governor or Rajpramukh is of opinion that the Anglo-Indian community needs representation in the Legislative Assembly and is not adequately represented in that body, he may nominate such number of members of the community to the Assembly as he considers appropriate (article 333). There is in this case, unlike in the case of the House of the People, no restriction on the quantum of such representation by nomination. The provisions relating to the reservation of seats and the representation of the Anglo-Indian community by nomination shall cease to have effect on the expiry of a period of ten years from the commencement of the present constitution (article 334).

One may want to know what an 'Anglo-Indian' means. An 'Anglo-Indian' means a person whose father or any of whose other male progenitors in the male line is or was of European descent. That, however, is not enough. He must have, in addition, Indian domicile. Again, descent and domicile cannot together make a person an Anglo-

Indian. It is further necessary to establish that he is or was born within Indian territory, of parents habitually resident in India and not established here for temporary purposes only [article 366(2)]. So an Englishman marrying an Indian woman may have an Anglo-Indian child. The reverse, however, is not true. An Indian, for instance, may have married an English woman and got a child by that wife. That child is not an Anglo-Indian.

24. Delimitation of Constituencies

Coming to the delimitation of Parliamentary and Assembly constituencies, each State, to which only one House of the People seat is allotted, forms one constituency. Every other State, to which more than one such seat are allotted, is divided into constituencies. In delimiting constituencies the area of each constituency, the number of seats allotted thereto and the number of seats, if any, reserved for the scheduled castes or the scheduled tribes in each constituency, are determined and specified. The same principle is followed in regard to the delimitation of the constituencies for the State Assemblies. Thus a person may, at the same time, be a House of the People voter, a State Assembly voter, a voter in a graduates' constituency, a teachers' constituency voter and a voter in a 'local authorities' constituency.

But no person is entitled to be registered in the electoral roll for more than one constituency of the same class. If, for example, you are a voter in a Midnapore territorial constituency for an Assembly seat, you cannot be a voter in a Calcutta territorial constituency for an Assembly seat. In plural-member constituencies other than Council constituencies, an elector has as many votes as there are members to be elected. But no elector is entitled to give more than one vote to any one candidate. There is thus no provision for what is known as cumulative voting.

One point should be noted in connection with the representation of States in the Upper House of Parliament. The quantum of representation is determined on the basis of population. The more numerous the population of a

State the greater is its quota of representation in the Council of States. This is contrary to the law and practice in America where the forty-eight States have equal representation in the Senate in recognition of the principle of equality between and among the component States. For representation in the Second Chamber of the Supreme Soviet, namely, the Soviet of Nationalities, the allocation of seats unit-wise has already been discussed. There is equal representation for the Union Republics. There is, however, no equality between such Republics and smaller units or between the smaller units *inter se*.

25. Judicial Proceedings in respect of 'Elections' and 'Disqualifications'

Our constitution lays down that no court has any power to enquire into or pronounce upon the validity of any law relating to the delimitation of constituencies or the allocation of seats to such constituencies. It further says that no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to the Election Commission in the prescribed manner (article 329). No civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the returning officer or by any other person appointed in connection with an election. The decision of the election tribunal set up for the purpose is final, so that the jurisdiction of the court is barred.

If, however, any question arises as to whether a member of either House of Parliament or of either House of the Legislature of a State has 'become' subject to disqualifications under the constitution, the decision of the President or the Governor or Rajpramukh, as the case may, shall be final. It is nevertheless contemplated that the President or the Governor or Rajpramukh shall act according to the opinion tendered by the Election Commission. Thus a difference is made, on the one hand, between 'disqualifications' to which a member 'becomes' subject and, on the other, the delimitation of constituencies, the allocation

of seats and other electoral matters, including an election. For instance, if the election of a person as member of the House of the People is challenged on the ground of personation or any other corrupt practice, it is a matter for the election tribunal finally to decide. If, on the other hand, the question arises as to whether he has or has not 'become' subject to disqualifications, it shall be disposed of by the President in accordance with the opinion given by the election commission.

In the case of *Ponnuswami v. The Returning Officer, Namakkal Constituency, Salem (1952)* the Supreme Court have held that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal, and should not be brought up at an intermediate stage before any court. The appellant in this case was one of the persons who had filed nomination papers for election to the Madras Legislative Assembly. The returning officer for the constituency concerned rejected his nomination paper on certain grounds. Thereupon, the appellant moved the Madras High Court under article 226, praying for a writ of *certiorari* to quash the order of the returning officer and to direct the latter to include his name in the list of eligible candidates. The High Court dismissed the appellant's application on the ground that it had no jurisdiction to interfere with the order by reason of the provisions of article 329 (b).

Then there was an appeal to the Supreme Court. The word 'election', according to the Supreme Court, is used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process. The only significance of the rejection of a nomination paper consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was enacted, as the Supreme Court observe, to prescribe the manner in which and the stage at which this ground or other grounds may be raised under the law to call the election in question. They have ruled that

the jurisdiction of the High Court under article 226 has been excluded in regard to matters provided for in article 329 which covers 'electoral matters'. In the case of *Election Commission, India v. Venkata Rao (1953)* the same court have ruled that articles 190(3) and 192(1) are applicable only to 'disqualifications' to which a member 'becomes' subject after he is elected as such, and that neither the Governor nor the election commission has jurisdiction to enquire into the disqualifications of a member which existed or might have existed long before his election.

26. The Controversy about Second Chambers

With the growth and development of representative institutions the question has been debated over a fairly long period as to whether a legislature should be unicameral or bicameral. The ruling class, on the whole, have in different epochs stood for a bicameral legislature and the arguments used by them have been taken up earnestly by writers, historians and commentators. A huge mass of literature has grown around the subject. It is not necessary here to go into that subject in detail, but one or two points call for notice, particularly in view of the recent move initiated in India in connection with the retention, extension, or abolition of second chambers in the States.

The two main arguments advanced in support of a second chamber are (i) that it is a brake on hasty, ill-conceived, uninstructed and dangerous legislation; and (ii) that in a federation it is an instrument to secure equal parliamentary representation for the constituent federal units. The basis of the first argument is class interest, but it has little or no substance in modern times from the popular point of view. What improvements, one may ask, has the House of Lords in Britain effected, or sought to effect, over the centuries, in the Bills passed by the House of Commons? Its record is nil except that from time to time it has sought to defeat popular measures so much so that in 1911 it was forced under threat to give its assent to the Parliament Act,

which has reduced its Powers to a considerable extent. In its legislative functions, as distinguished from its judicial functions, the House of Lords is, more or less, an ornamental but provocative anachronism.

If a democratically elected House cannot be relied Upon in dealing effectively and adequately with matters entrusted to its charge without absolute or suspensive veto by another House, hereditary, elected, or partly selected and partly nominated, then it is a case against democracy and not against a unicameral legislature. In a real democracy it is the people who must decide what is good legislation and What is bad legislation, what is hasty legislation and what legislation is not hasty or ill-conceived. What is hasty and dangerous to a privileged and entrenched class may be welcome to the vast majority of the people who are being exploited by that class. In the name of sobriety and wisdom such measures may be, and are, in fact, sponsored by the exploiting or acquisitive class as inflict misery and humiliation on the dispossessed classes.

In a formal democracy sometimes a second chamber comes handy to the ruling class not only as a safety-valve but also for judicious distribution of political patronage to keep themselves in Power. Not infrequently does it happen that a Powerful member of the ruling party, if and when defeated in a Contest for a seat in the "lower" chamber, is kicked upstairs to please and placate him and to adjust the machine to his requirements. Sometimes, again, a shrewd party organiser keeps an inconvenient party member out of harm's way by finding accommodation for him in the second chamber.

The theory that a second chamber is a check on hasty legislation finds no support from the modern trend of legislation. Legislation, except in minor cases, is sponsored by Ministers and exponents of public policy, and Bills are drafted by persons specially equipped for that purpose. How, then, does the question arise that legislation is not well considered or carefully drafted in the absence of a second chamber? What is equally important, a very large

proportion of laws is contained not in legislation enacted by the legislature but in what is known as delegated or ancilliary legislation which is handled by experts. Legislation reflects the policy of those who for the time being are in power, and that policy is not determined by the existence or non-existence of a second chamber. Second chambers are, on the whole, survivals of outmoded political categories. The privileges which were formerly enjoyed by the landed aristocracy and their descendants are now passing on to a 'money' aristocracy. In most cases second chambers are either centres of reaction or expensive and vexatious busi-bodies.

27. A Bicameral Legislature in Federation

I now Come to the second argument, that is, their utility in a federation. If there is a second chamber at the national level, it is argued, then the equality of representation of different units may be ensured through that chamber. If there is no second chamber, one unit may dominate another and create conditions dangerous to the stability of the State. By itself it does not mean much. For, equality among federal units does not rest merely on equality of representation in the second chamber. That, of course, is important. But there must, in addition, be equality, as far as practicable of their respective memberships of the two Houses, otherwise one House may be swamped and rendered ineffective by the other where there is provision for joint sessions resolve differences.

Again, there must be equality of powers between the two Houses in regard to all matters of legislation. In the absence of such equality one House may impose its own will upon the other. What, however, is vital is that each of the federal units must have the right to self-determination, that is, the right ont only to grow and develop in its own way but, if necessary, to secede. This right is of the essence of equality, and without it all the other forms of equality may be used by the dominant class at the centre and in certain units as a cover for all kinds of oppressive, tyrannical and chauvinistic acts.

In the US, it has already been pointed out, all the forty-eight States are equally represented in the Senate. In early days the leaders of American politics looked upon the Senate not so much as a protector of the States and their rights as a guardian of the upper class interests, being a check on the alleged "radical tendencies of the House of Representatives." Inspired mainly by that motive one or two important powers were given that body: (i) confirmation of certain high presidential appointments, and (ii) approval of treaties negotiated by the President. On the other hand, the power to initiate taxation measures was given to the House of Representatives. Gradually, however, the Senate has been able to gain influence in the matter of financial policies inasmuch as it has power to amend such policies.

The American Senate has, as a matter of fact, come to occupy a place in the mechanism of the American federal republic which is at once powerful and impressive. But it is difficult to maintain that by virtue of this position the Senate ensures the equality of the States. In the inner struggle of the ruling class the weight of the Senate may go in support of this section or that section and, in the process, may be utilised for weakening the President or strengthening his hands according as circumstances in a given situation may determine. But this underplay of the forces has very little to do with the protection of State rights as such as against the claims of the ruling class at the centre.

All the forty-eight States in, America have bicameral legislatures, except the State of Nebraska, where a unicameral legislative body has been introduced since 1937. This experiment, in the opinion of certain competent observers, has "demonstrated beyond the possibility of a doubt the great superiority of the one-house legislature", and its record is "far superior to the record made by any previous legislature in the history of Nebraska". There is absolutely no reason why the Nebraska experiment should not be followed elsewhere. At any rate, where both the Houses, as is generally the case, represent almost the

same electorates and virtually pursue identical ends the interests of the people demand that this expensive show should be abandoned. Where, however, federation is a living reality, and not merely a mechanical formality, a bicameral legislature is not only desirable but necessary.

It may be recalled that there were amendments to the draft of the famous Stalin Constitution of 1936, proposing to abolish the Soviet of Nationalities and retain only the Soviet of the Union. Opposing these amendments Stalin said :

Among us there is a supreme organ where the general interests of all toilers of the USSR—irrespective of their nationalities—are represented. This is the Soviet of the Union. But, in addition to their general interests, the nationalities of the USSR have also their own particular, specific interests, connected with their national characteristics. Is it possible to disregard these specific interests? No, it is not possible. Is there necessity for a special supreme organ which would reflect precisely these specific interests? Yes, absolutely. There can be no doubt that it would be impossible without such an organ to administer such a multinational State as the USSR. Such an organ is the Second Chamber—the Soviet of Nationalities of the USSR.

The amendments were dropped, and both the Houses have been retained in the constitution that is in force. There are no 'lower' or 'upper' Houses in the USSR in the sense these expressions are used in English political literature. It is not contemplated, as in Britain, in America and in many other countries, that the second chamber would suspend, delay or veto proposals sponsored by the first. No conflict arises in the normal course of events in view of the same class essence and character of both the Houses. They are both elected by the toiling people in country as well as in town. Both have equal rights and enjoy the same measure of initiative in legislation. Both are elected for four years and at the same time.

If the Soviet of the Union and the Soviet of Nationalities disagree on any particular measure, the difference, in the first instance, is sought to be decided by a board of conciliation equally representative of both the chambers. Should the board fail to yield an agreed decision or Should its decision be not approved of by one of the chambers,

the controversial issue is again taken up by the chambers. If even then no agreement is reached, the chambers are dissolved by the Presidium and new elections are ordered (article 47). This, it should be remembered, does not happen normally; but if it does happen on any occasion, the ultimate authority to decide the issue is the electorate. Special sessions of the Supreme Soviet may be convened by the Presidium in their discretion or on the demand of any of the Union Republics. These are in addition to the ordinary sessions which are summoned by the Presidium twice a year (article 46).

So far as our Union Parliament is concerned, there is, of course, no question of abolishing the Council of States. There is, however, need for its reconstruction, keeping in view the susceptibilities of different nationalities and their requirements. But such reconstruction, again, would not be enough unless the right of self-determination for the units is at the same time recognised. For the States, for the reasons previously discussed, it is no good preserving second chambers except perhaps in those States where, through these chambers, the claims of minor nationalities and tribes may be effectively focussed. As the second chambers stand to day, they are either useless or interfering busibodies. They should not be maintained in their present form.

CHAPTER XIII

THE JUDICIARY

1. The Story of its Evolution

I now come to the Indian judiciary. Before the subject is dealt with in detail it is, however, necessary to call attention to the exact role of the judiciary in the institutional mechanism of a modern State. There are lyrical effusions even in scholarly works about the independence of judges, their impartiality and their objective and dispassionate approach to problems which are canvassed before them in the course of litigation. It is true that in consequence of the bourgeois-democratic revolution measures have been taken which have, to a certain extent, placed the higher branches of the judiciary outside the direct and immediate control of the old tyrannical monarch and his hangers-on and flatterers. The selection of judges from among the members of a trained profession; the security of tenure during good behaviour ; the immunity given them from political attacks; the assurance of guaranteed salaries, allowances and pensions protected against the vicissitudes of a political vote; and similar other provisions signalise a definite advance on the bureaucratic and caste courts of a feudal State. The association of jurors in the dispensing of justice by regular courts of law reorganised against the background of the shifting of political power from the noble-landowner class to the capitalists and industrialists has given, in historical perspective, the functioning of the judiciary in organised capitalistic States a democratic character, and marks a great step forward. To deny all this is to deny the pattern of human history and the role of man in the unfolding of the social drama by the harnessing of the resources of nature to his use.

But for that reason one should not shut one's eyes to the simple fact that the judiciary is, after all, an organ of

the State, and is permeated by the character and complexes of the class which in a given situation supports and sustains the State. The judiciary is not, that is, above the class that is the State; and to suppose that the judges hold the scales even in conflicts between the ruling class and the ruled, between the State and the individual citizens or even between the individual citizens *inter se* is no more than an illusion. The so-called democratic forms introduced in the composition of the judiciary and the determination of functions cannot obliterate the class character of the court, and of the jury summoned in certain cases to assist it and the class direction of the justice which it dispenses.

Historically, the functions of the court grew out of the functions of the ruling class, and it is not surprising that even a bourgeois historian of the stature of James Mill should have felt constrained to observe that "the executive functions of government consist of two parts, the administrative and the judicial." He might have added that all the different organs or instruments of the State shared together, though apparently in separate compartments, in all the processes vital to the functioning of an organised political community, despite the doctrine of the separation of powers. In the result the energy and wisdom, the skill and experience of all these three organs or instruments are bent to the service of the class from which they are mostly drawn and to which ultimately they owe their authority and power.

2. The Role of the US Supreme Court

Take the US Supreme Court. That court plays a role in the organised political life of the American people which has no parallel in the world's history today. It is not only the interpreter of the constitution; it is acclaimed as its guardian too. Not only does it interpret the law of the constitution; it has also the power of judicial review of legislation. Some scholars have gone so far as to suggest that the American Supreme Court has, by judicial adjudication and review, acted on frequent occasions in such a manner as though it were a super-legislative body, not to speak of a Third Chamber.

Now, the judges of the Supreme Court are appointed by the President with the concurrence of the Senate [article II, section 2 (2)]. They hold office during good behaviour and receive for their services a compensation which cannot be diminished during their continuance in office (article III, section 1). Their retirement is optional, the usual age of retirement being seventy. But should on any occasion the judges prove themselves hostile to the policy of the State recourse is had to the 'court-packing' device. The Congress has power to alter the membership of the court at any time, and indeed in several instances the number of judges has been increased or decreased to suit the requirements of the State's policy-makers. Men have sometimes been appointed to the Supreme Court, who are suspected to support the policy and programme of the Administration. The membership of the Supreme Court has varied from five to ten from time to time. The number of judges has been nine since 1869.

What, again, is significant to note is that if and when the judges have differed from the policy or programme of the Administration as reflected in Congressional legislation or in subordinate legislation, they have done so generally not because the Administration's policy or programme was reactionary and harmful to the cause and interest of the people as a whole but because it was not in strict conformity with the interest of the ruling class, that is, the interest of property holders. The judges have, in practice, proved on numerous occasions more conservative than even the Administration or the law-makers.

3. The Law *versus* the Court

Assuming, however, that the judges are as impartial and independent as they are claimed to be in certain circles, what opportunity do they, in fact, possess to show their impartiality and independence? Is not the opportunity, if any, very much restricted? The primary function of the court is to clarify the meaning of the law, that is, the law as enacted by a competent authority, legislative or executive.

It is not for the judges, ordinarily speaking, to make the law. In interpreting the law the judges cannot, at least in theory, examine, scrutinise and adjudicate upon the policy underlying the law. They are expected to say honestly and impartially what the law means. To them the policy behind the law or its aims may be very bad indeed, or even atrociously antisocial, and yet they cannot pronounce upon that policy or those aims. Their function is to see whether the law brought to their notice in the course of litigation or otherwise has been enacted by an authority authorised to enact it, and then to explain its meaning and to give their judgment on merits. Once they are satisfied about the competence of the authority enacting the law they are required to enforce it, whether or not politically, ethically or, on other social considerations, it is an unjustifiable law. If a technically good law discriminates between the State and its servants on one side and the individual citizens on the other, they will simply have to endorse and apply it to a given dispute. They may regret the discrimination involved, but to regret it is not to annul it.

That being so, how can the judges be impartial and independent in the administration of justice? They are subordinate to the law, and the law, and not the court, is supreme if it comes to a conflict. Have not the judges in Britain and in our country too solemnly stated on many an occasion that they cannot decide the question as to what the law should be, and that what they are concerned with instead is what the law is and what it implies? And the law expresses the will of the ruling class or is sanctioned by it, and consequently to that will and that sanction the judges are ultimately subject. Again, if the judgment of a court does not commend itself fully to the Administration, steps may be taken, as they are sometimes taken, to countermand the judgment by appropriate changes in the law. I do not suggest that the judges should be empowered to supersede the law-making authority or to veto its enactment. But no misconception should exist about the functions of the court and its limitations.

4. Judicial Review Reflects Class Conscience

In reply it may be said, as it has now and then been said with particular reference to the US Supreme Court, that apart from its interpretation of the law, it has also the power of judicial review of legislation, and that, in the exercise of that power, it decides whether or not any legislation has fulfilled the requirements of 'the due process' clause. In discharging its functions in this regard the Supreme Court has created a vast body of judge-made law in accordance with common law standards and the principles of equity, fairness and good conscience, that is, in accordance with 'the rule of reason'. But the 'rule of reason' is not an eternal verity; it is, on the contrary, an expression of the class conscience.

The modern legislation, it is pointed out, involves the use of such vague terms as 'fair and reasonable', 'public interest', 'due consideration', 'public order', the 'security of the State', and the judges are called upon to interpret these terms. In doing so, the judges may sometimes invalidate legislation and thus shape and determine public policy. Therefore, it is contended, should they so desire the judges may show impartiality and independence not only by the interpretation of the law but, what is more important in the US, by the exercise of their power to review legislative and executive acts and to declare them null and void. In earlier periods of American history as well as in comparatively recent times the Supreme Court has, by these twin processes, entered into the field of legislation and taken a share in the making of policy. Thus, to a certain extent, the supremacy of the judiciary has been established in America as against the British theory of the supremacy of Parliament. There is, I admit, substance in this contention.

But one or two points must be remembered in this connection. The US method of judicial review, in the first place, is not recognised in modern States, including Britain and our own. In the second place, the implications of the power of judicial review are not, in a social sense, pertinent to the question of the impartiality and

independence of the judges. Does the exercise of this power conclusively prove that the judges are impartial as between the ruling class and the ruled ? Certainly it does not. In the inner conflict of the capitalist class the court may swing one way or the other, but it does not mean that it holds the scales even between the capitalist class as such and the toiling millions in factory and field. It may demonstrate in a way its independence of this or that pressure group in the Congress or in the Administration, but by no means does it prove its independence of the social basis of the State which is organised class coercion.

In a society of unequal and antagonistic classes the court, which is manned by members mostly drawn from the privileged class, cannot act impartially and independently where the disputed issues are issues arising out of the class conflict. Up to a point certain judges may show liberality of outlook, even generosity of mind, but when a conflict of hostile classes ensues the sympathy and support and authority of the court are consistently and uniformly on the side of the class to which its members generally belong or to which they owe their eminence in the social scale.

5. The 'Property' Conscience of Judges

It is true that the judges are called upon to decide matters according to their conviction and conscience. By and under our constitution, for instance, the judges of the Supreme Court and the High Courts are required to swear or affirm that they will bear true faith and allegiance to the constitution as by law established; that they will duly and faithfully and to the best of their ability, knowledge and judgment perform their duties without fear or favour, affection or illwill; and that they will uphold the constitution and the laws (Third Schedule). Almost similar forms of oath or affirmation are in use in different parts of the world, including the US and Britain. The judges are thus bound by the constitution and the laws, even though the constitution and the laws may be repugnant to the principles of equity, fairness and good conscience.

Apart from this basic requirement of the constitution and laws, the ability, knowledge and wisdom of judges, as of ordinary men or women, cannot be isolated from their experience, their education and their environment. In his *Proceeding Against Gottschalk and His Comrades* (1848), Marx wrote that "conscience depends on consciousness, on the entire form of man's life". A 'have', as he observed, has a different conscience from a 'have-not'. A 'trained' conscience is the conscience acquired in the environment where the training is given and received. A propertied man has 'property' conscience, which is different from the conscience of the 'dispossessed' or the 'propertyless'. The conscience of the 'privileged' is a 'privileged conscience'. Consequently, when the judges of the American Court exercise their power of judicial review, as distinct from their interpretation of laws, they are apt to bring their 'privileged conscience' to bear upon their judgments, and several cases decided by them on the Roosevelt New Deal Legislation of the thirties of the present century unmistakably lend support to this view.

In the case of *Louisville Joint Stock Land Bank v. Badford* (1935) the Supreme Court declared the Frazier-Lemke Farm Mortgage Act, 1934, invalid by reason of its violation of the due process of law clause (Fifth Amendment) by taking property without just compensation. That was also one of the three grounds upon which in the famous case of *Schechter v. United States* (1935) certain provisions of the NIRA Act, 1933, were annulled. In both these cases the vote was unanimous, showing, as it does, the Supreme Court's concern over the violation of property rights and the Roosevelt Administration's alleged indifference to those rights. These are, no doubt, instances illustrating the courageous and fearless display by the court of its 'property conscience' and its 'independent' outlook in relation to the Administration and its policy. But its conscience was nevertheless used to protect and safeguard the interests of the class with whom the ultimate power of the State virtually lay, and the independence was, in fact, no more than dependence on the constitution and laws which are

designed primarily and essentially to ensure the 'sanctity' of private rights in the instruments and means of production.

6. From Courts to Courtiers

When in the eighteenth century they spoke of the independence of the judiciary they meant its independence of feudal authority, and from a certain point of view it marked a progressive phase of the judicial process. The forms of judicial independence in countries, where the bourgeoisie are in the vanguard of the ruling caste, are in the nature of a screen, masking the class character of the court and the holders of judicial offices. Students of all judicial systems, particularly of our own, should keep these considerations in mind.

One should further remember that in modern times the regular courts of law, which, in theory as well as in practice, are identified with the judiciary are not the only organs or instruments of adjudication of disputes. There are special courts and tribunals set up from time to time to try what are commonly known as political offences, that is, offences directed against the security of the State and the social order. Again, disputes of a specific nature as, for example, those between capital and labour, between workmen and workmen or between employers and employers are decided by tribunals which are not regular courts of law. Then there are military tribunals which try members of the armed forces charged with offences. Moreover, a large and increasing mass of judicial or quasi-judicial decisions are given by Ministers, ministerial tribunals or departments of Governments. At the lowest level benches and courts are constituted, as in our country, of members of certain self-governing bodies, which are empowered to try petty offences and hear and decide petty civil suits respectively. The judiciary so-called, therefore, is not the entire judicial system of a modern State, and a very large percentage of judgments, decrees and orders comes, not from the regular courts of law, but from bodies or persons who are no part of the normal judiciary understood in its

technical sense. It shows that no longer do the policy-makers rely on the skill and efficiency of the regular courts of law for adjudication on the complex social issues of our time. New agencies are instead created for the purpose, and these agencies are more susceptible to political pressure than the ordinary courts. Capitalist society in crisis tends to move from courts to courtiers.

7. The Judiciary in early British Rule in India

Without a clear grasp of all the principles and social trends discussed above it would be difficult to appreciate fully the exact role of the Indian judiciary as an organ of power and the functions of different courts and their members. It seems necessary also to say a few words about the judicial system prevalent in this country under the British regime in order to facilitate proper appreciation of the judiciary as contemplated under our present constitution.

In the early stages of the East India Company's rule the district and moffusil courts were under the judicial and administrative control of the Sudder Courts, civil and criminal. They were the highest courts of appeal. First established in Bengal they were extended to other parts of the country within the Company's jurisdiction. Side by side with these Sudder Courts, the Supreme Courts were also established first in Calcutta and, later on, in Madras and Bombay. They were the King's Courts created by Royal Charters issued under the Regulating Act of 1773.

The jurisdiction of the Supreme Courts was restricted to the three principal ports—Calcutta, Madras and Bombay. The law administered by them was mainly English law. They had power (i) to hear and determine all complaints against any of the King's subjects for any criminal offence ; (ii) to entertain, hear and determine any suit or action against any of the King's subjects ; and (iii) to entertain, hear and determine any suit, action or complaint against any person employed directly or indirectly in the service of the Company or of any of the King's subjects. The Sudder Courts and the Supreme Courts were separate from, and independent of one another, and thus a sort of judicial

dualism was introduced. This led to a good deal of confusion.

There should, however, be no misconception as to the position and status of these Courts. The sovereignty of the British Crown did not then extend to these territories. Therefore, the courts functioned not by virtue of legal sovereignty or merely on the alleged principle that Englishmen carried with them, wherever they were, their own laws, statutes and courts. They functioned with the sanction of the then sovereign of India so that the British community could apply their own laws to themselves and to their Indian servants under their protection with adaptations to local circumstances.

8. The Institutional Changes After the Rebellion of 1857

The situation became clearer when the Crown assumed direct rule in 1858. Those two sets of Courts were abolished and their jurisdictions transferred to High Courts created under the Indian High Courts Act, 1861. The idea was that the High Court, in the exercise of its ordinary original jurisdiction, civil and criminal, was the successor to the Supreme Court while, on the appellate side, it inherited the jurisdiction and powers of the Sudder Courts. That idea, it may incidentally be mentioned, was responsible for the rule that advocates were entitled only to 'appear and plead' instructed by attorneys empowered 'to act' on the original side as in the Supreme Court while, on the appellate side, they were free 'to act and plead' as in the Sudder Courts. The practitioners known as vakils, as distinguished from advocates—a distinction which has since been abolished—were allowed neither to act nor to plead on the original side but were entitled both to act and plead on the appellate side. In Madras, however, the vakils were soon permitted by a rule made by the High Court [*In the matter of the Petition of the Attorneys (1875)*] to appear, plead and act on the original side also.

These two separate jurisdictions, original and appellate, were maintained in Calcutta and Bombay, But no such

distinction was drawn between advocates and vakils as regards their right to appear, plead, and act in the other High Courts subsequently established in British India without original jurisdiction. *In the case of Aswini Kumar Ghose and another v. Arabinda Bose and another (1952)* the Supreme Court has held that an advocate of that Court becomes entitled as of right to appear and plead as well as to act in all the High Courts, including the High Court in which he is already enrolled, without any differentiation being made for this purpose between the various jurisdictions exercised by those Courts.

The Supreme Courts created by Charter were courts of record as the Mayor's Court had previously been under the Charter of 1753. Appeal lay from the decisions of the Mayor's Court to the President and Council at Fort William, who was also constituted into a court of record. The High Courts set up under the Act of 1861 were recognised as courts of record, having inherited the jurisdiction, so far as Calcutta, Madras and Bombay were concerned, of the King's Courts known as the Supreme Courts. Even the non-successor High Courts, for instance, the High Courts of Allahabad, Patna, etc., became courts of record (The Government of India Act, section 106).

9. From 1937 to 1950

Up to the year, 1937, when certain provisions of the Government of India Act, 1935, were put into operation the High Courts were the highest judicial authorities in the provinces. Each of them exercised superintendence over all courts for the time being subject to its appellate jurisdiction, and had power *inter alia* to call for returns and direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction (The Indian High Courts Act, 1861, section 15, & the Government of India Act, section 107). In certain circumstances and on certain conditions appeals from the decisions of the High Courts could be carried

to the Judicial Committee of the Privy Council created under the Act of 1833, which, as regards Indian appeals, succeeded to the jurisdiction of the King in Council. To the latter body appeals from the decisions of the Supreme Courts had lain, it being clearly understood that no criminal appeals could be canvassed before the King in Council without leave of the Supreme Courts.

Under the Government of India Act, 1935, a new court, called the Federal Court of India, was set up. It had power to entertain appeal from a judgment, decree or final order of a High Court in any British Indian province only where the High Court certified that it involved an interpretation of the constitution, but not otherwise (section 205). In other matters appeals lay in suitable cases to the Judicial Committee from the decisions of the High Courts, and there was also provision for appeal to the Committee with or without leave from a judgment of the Federal Court (section 208). That was, more or less, the position until January, 1950, when the present constitution was inaugurated.

During the years, between August, 1947 and January, 1950, certain minor adjustments or adaptations were made. Throughout the entire period the High Courts as well as the Federal Court, it should be noted, were recognised as courts of record. The status of the High Courts as courts of record is retained under the new constitution (article 215), and the same status is conferred on the Supreme Court of India (article 129), which, to all intents and purposes, has succeeded to the jurisdictions of the Federal Court and the Judicial Committee of the Privy Council. So far as India is concerned, these latter two bodies have been abolished.

10. The Meaning of "Court of Record"

Now, what is a court of record? This expression has been borrowed from English law. Originally it meant a court, the records of which were preserved in archives. These were themselves conclusive evidence of what was

recorded therein. No contrary evidence was entertained or sustained. Other courts might have records too, but these records were called registers and, as such, could be challenged on evidence. These latter were not courts of record.

A court of record took no notice of any matter of fact; it had power to take notice only of matter of record. In modern times a court of record is a court which, though a civil court, has power to punish, principally for contempt and, as in the case of the British House of Lords which is a court of record, also for a breach of privilege. The power to punish in this context includes the power to imprison as well as to impose a fine.

When the ancient English notion of a court of record is of no practical value at the present time, why, it may be asked, has this term been used in our constitution with reference to the Supreme Court and the State High Courts, regard being had specially to the fact that they have been specifically empowered to punish for contempt of themselves? If it were the intention of the framers of our constitution merely to vest in the Supreme Court and the State High Courts the power to punish for contempt of themselves, then as courts of record they had that power. It was perhaps not necessary to add a clause stating that they have power to punish for contempt of themselves. Conversely, when that power has been explicitly conferred upon them, the insertion of the expression "court of record" sounds redundant except as a record of ancient English history.

British draftsmen had better appreciation of the legal implications of this phrase as would appear from the provisions of section 106 of the Government of India Act and of section 203 of its 1935 successor. May be the draftsmen of the Indian Constituent Assembly meant something more, which, of course, is not clear, or they just reproduced from English law this term as they borrowed many other words, phrases and expressions, pertinently or otherwise.

11. Our Supreme Court

The constitution requires that there shall be a Supreme Court of India. There are commentators who classify the powers assigned to it into (i) its powers as an appellate court, (ii) its powers as a federal court, and (iii) its powers as the guardian of the constitution. The Supreme Court is no other than the Supreme Court. Its powers and jurisdiction are such as are conferred upon it by the constitution. It disposes of matters of which it may be in seisin according to rules made by it. To describe its jurisdiction in the manner those commentators have done may create confusion as to the exact role of the Court and its functions.

It seems that the commentators have been led to interpret the Supreme Court's jurisdiction in this way in view not only of the constitutional provisions but also of the rules made thereunder for the constitution of Benches. There is, however, no warrant for this misleading interpretation. In accordance with the rules made by the Court, in the exercise of the power conferred upon it by the constitution, every cause, appeal or matter shall be heard by a Bench consisting of not less than three judges nominated by the chief justice. If, however, in the course of hearing the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the chief justice, who shall thereupon constitute such a Bench for the hearing of it. The minimum number of judges who are to sit for deciding any case involving a substantial question of law as to the interpretation of the constitution or for the purpose of hearing any reference under article 143 shall be five. These provisions do not necessarily make the Supreme Court at once a "Federal Court" and a "guardian of the constitution."

The Supreme Court consists of a chief justice and, until Parliament by law prescribes a larger number, of not more than seven other judges. The President appoints all the judges. In the case of puisne judges, appointments are made in consultation with the chief justice. In the case of the chief justice, the appointment is made after consultation with such judges of the Supreme Court and

of the State High Courts as the President may deem necessary. Each judge holds office until he is sixty five years old. He may, however, resign at any time. He may be removed by the President after an address has been presented to him by each House of Parliament. The address must be supported by a majority of the total membership of each House and by not less than two-thirds of the members present and voting in the same session for such removal on the ground of proved misbehaviour or incapacity. Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a judge.

No person other than a citizen is eligible for the office of a judge. That is the first requirement. As regards qualifications, no citizen is eligible for appointment unless he has been a High Court judge for five years, or a High Court advocate for ten years, or is, in the opinion of the President, a distinguished jurist (article 124). This provision for appointment of jurists as judges from outside the profession is an innovation. This is a welcome change inasmuch as it may, if properly, adequately and effectively utilised, impart a desirable flexibility to the Court by the importation into its composition of fresh minds capable of investigating issues, not merely from the point of view of the technical side of law and procedure but from the standpoint of the social urges and of the needs of the community. On the other hand, this provision, coupled with Parliament's power to increase the number of judges, may be employed by the Administration for the purpose of packing the court with men committed to their policy and programme.

The salaries of the judges are guaranteed in the Second Schedule, and so also are their allowances, pensions and other privileges (articles 125 & 221). The salaries, allowances and pensions payable to or in respect of the Supreme Court judges and the pensions payable to or in respect of the judges of the Federal Court and of the State, or Provincial High Courts are charged on the Consolidated Fund of India and, therefore, not votable [article 112 (3) (d)]

(I) (II) (III)]. Similarly, the expenditure in respect of the salaries and allowances of the High Court judges is charged on the Consolidated Fund of the State concerned [article 202 (3) (d)].

12. Retired Judges Debarred from Practising

No person, who has held office as a Supreme Court judge, can plead or act in any court or before any authority within the territory of India—a disability which applies equally to a person who has been a High Court judge after the commencement of the constitution (articles 124 & 220). I see no point in these provisions. Judges, who retired or resigned before the commencement of the constitution, can plead or act in any court or before any authority. Sri N. C. Chatterjee held office as a judge of the Calcutta High Court. Sri P. R. Das was for sometime a judge of the Patna High Court. Both these advocates are actively in the profession, appearing in important cases before the courts or tribunals. What private or public harm has been done by their freedom to act or plead or both to act and plead is more than one can say.

If it was intended by these provisions, as it seems it was, to keep the judges away from the temptation of preferment and patronage from any quarter and to ensure the exercise by them of their functions without fear or favour, affection or ill will, then that intention seems to have been defeated by the Administration's appointing serving or retired judges to political or other appointments. There are several instances of such appointments. If a judge is encouraged to hope that he may be deemed eligible for a more lucrative or otherwise suitable appointment while still in service or upon resignation or retirement, you cannot expect from him that detachment or independence which is associated in the public mind with the office of a judge. To debar judges from political or other appointments may or may not give them immunity from susceptibility to visible or invisible influences, but when appointments are offered them in recognition of their qualifications or as a reward for their services, as

appointments have been offered and accepted in several cases during the last two or three years, the disability imposed upon them in respect of acting or pleading upon resignation or retirement loses all sense.

Again, the question may arise as to what is meant by the words 'plead' and 'act' used in the relevant articles of the constitution. Ordinarily, in the present context these words together carry the same meaning as 'practise'. In other words, the term 'practise' ordinarily means 'appear, act and plead' unless there is anything in the context or the subject to limit its meaning. An attorney 'acts' while an advocate 'pleads' within the original civil jurisdiction of the High Courts of Calcutta and Bombay, unless, of course, the advocate is an advocate of the Supreme Court who, on the authority of the Supreme Court's ruling in *Aswini Kumar Ghose's case*, is entitled both to 'act' and to 'plead'.

But the word 'act' may also convey a different meaning. When a State Governor, for instance, makes a report to the President under article 356, or reserves a Bill for the consideration of the President under article 201, he not only acts but "acts before an authority within the territory of India", that is, the President. If, therefore, the object of clause (7) of article 124 or article 220 was to debar the judges from 'practising' in any court or before any authority, say, a tribunal or Commission, the word 'practise' should have been used instead of 'act'. It may be contended that the word 'act' used alongside 'before any authority' extends the scope of the disability attaching to the judges of the Supreme Court and State High Courts so that, upon resignation or retirement, they can neither 'practise' before any court, tribunal or commission nor otherwise 'act' before any authority, judicial, quasi-judicial or other. In that view of the matter, the law should be suitably amended, or complications may arise, affecting the position of certain holders of high offices who have been appointed thereto upon their resignation or retirement as Supreme Court or High Court judges.

13. The Supreme Court's Jurisdiction

The jurisdiction of the Supreme Court may be classified into (i) original (article 131) ; (ii) appellate in constitutional matters (article 132) ; (iii) appellate in civil matters (article 133) ; (iv) appellate in criminal matters (article 134) ; (v) reference (articles 143 & 317) ; and (vi) remedial by writs for the enforcement of fundamental rights (article 32). In addition, the Supreme Court has power in its discretion to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. The judgment, determination, sentence or order passed or made by any military court or tribunal does not, however, come within the purview of its jurisdiction (article 136). Again, the jurisdiction and powers which were exercisable by the Federal Court under any existing law shall be exercised by the Supreme Court until Parliament by law otherwise provides (article 135). Additional jurisdiction may be conferred on it by Parliament, including the power to issue directions, orders or writs or any of them for purposes other than the enforcement of fundamental rights (articles 138-140).

The law declared by the Supreme Court is binding on all courts within the territory of India (article 141). Any decree passed or order made by the Court shall be enforceable throughout India in such manner as may be prescribed by or under any law made by Parliament, and, until provision in that behalf is so made, in such manner as the President may by order prescribe (article 142). All authorities, civil and judicial, in India shall act in aid of the Supreme Court (article 144).

The Supreme Court's original jurisdiction extends, to the exclusion of any other Court, to a dispute (a) between the Government of India and one or more States; (b) between the Government of India and one or more States, on the one hand, and one or more States on the other; or (c) between the States *inter se*. The dispute must be one involving a question of law or of fact, on which the existence or extent of a legal right

depends. A mere question of fact or even of law may involve a dispute, but that is not a dispute which necessarily attracts the original jurisdiction of the Supreme Court. It must be a question, whether of fact or of law, of a particular nature, that is, a question upon the determination of which the extent or the very existence of a legal right can be ascertained.

A dispute arises, say, between the State of West Bengal and the Government of India, as to whether under the constitution Parliament can legislate as to the University of Calcutta on the basis of entries in the three Lists of the Seventh Schedule. In this dispute is involved a question of law upon which depends the existence of the legal right of the Government of India *vis a vis* the State of West Bengal. Again, a dispute arises, say, between Orissa and Bihar, as to whether Seraikella has actually been merged in Bihar. In this dispute is involved a question of fact upon which the legal right of Bihar to legislate as to that part of territory depends. These are disputes which come within the arena of the Supreme Court in the exercise of its original jurisdiction. On the other hand, the propriety or the political implications, as distinguished from the legal validity, of a direction given by the Government of India, say, to Uttar Pradesh as to the measures to be taken for the protection of the railways within that State, may give rise to a dispute which, however, cannot be canvassed before the Supreme Court in the exercise of its original jurisdiction.

14. The Meaning of "Legal Right"

Attention may be invited in this connection to the case of *The United Provinces v. The Governor-General in Council* (1939), in which the Federal Court examined at length the implications of the phrase 'legal right'. The facts of the case may be briefly set out. Under the Devolution Rules framed under the Government of India Act, 1919, 'cantonments' was a central subject and so was criminal law, including procedure and all other matters not included among the provincial subjects. 'Administration of justice,' on the other hand, was a provincial subject, which

expressly included the constitution, powers, maintenance and organisation of civil and criminal courts, subject to legislation by the Indian legislature as to the courts of criminal jurisdiction. An Act entitled the Cantonments Act (II of 1924) was passed by the Indian legislature. Section 106 (c) of that Act provided for the formation of cantonment funds to which were to be credited all fines recovered from persons convicted of certain offences committed within each cantonment.

The United Provinces instituted a suit before the Federal Court in the exercise of its original jurisdiction (section 204) against the Governor-General in Council for a declaration *inter alia* that section 106 (c) of the Cantonments Act was *ultra vires* the then Indian legislature. The Governor-General in Council denied that any provisions of that Act were invalid, and contended further that the dispute was not one which was justiciable before the Federal Court and that, accordingly, the Court had no jurisdiction to entertain the suit. The Federal Court held, among other things which are not relevant to our present discourse, that the dispute with regard to the validity of the impugned section of the Cantonments Act involved a question on which the existence of a legal right depended, notwithstanding that prior to the passing of the Government of India Act, 1935, the provinces had no right to sue the Central Government in any court of law. It ruled that the Federal Court had jurisdiction to entertain the suit.

What is a legal right? Does it mean a right recognised by law irrespective of the question whether or not it is enforceable in a court of law? Or does it mean a right which is not only recognised by law but is enforceable in a court of law as well? In support of the Governor-General in Council it was contended in the aforesaid case that where there was no remedy through a court of law there was no question of a legal right, and that because prior to the Act of 1935, the Provinces could not sue the Government of India to establish their alleged claims in any court of law, no 'legal right' on the part of the United Provinces existed. The United Provinces, it was suggested,

could seek redress of its grievances, if any, by petition or representation to the Government of India.

The Advocate-General of India quoted with approval from Holland's *Jurisprudence*, in which the expression 'legal right' is defined thus: "If irrespectively of his having, or not having, either the might or moral right on his side, the power of the State will protect him in so carrying out his wishes, and will compel such acts or forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a 'legal right' so to carry out his wishes". There is no clear indication in this definition how 'the power of the State' is to be employed or exercised for the purpose. Is it to be done by executive action or judicial process or legislative enactment? In any event, the remedy through judicial process, according to Holland, is not an essential element of a legal right.

On the other side, reference was made to Salmond (*Jurisprudence*) who says: "Although a legal right is commonly accompanied by the power of instituting legal proceedings for the enforcement of it, this is not invariably the case, and does not pertain to the essence of the conception." A legal right is defined "as any advantage or benefit which is in any manner conferred upon a person by a rule of law". It may or may not involve a corresponding legal obligation. Mention was made by one of the judges of the Federal Court of a debt barred by limitation. Such a debt, in his opinion, exists and repayment of it is perfectly valid, even though it cannot be enforced by action in a Court of law. It is an instance of a legal right which is not enforceable by judicial process.

The expression 'legal right' in section 204 of the Government of India Act, 1935, which, with certain necessary modifications, is reproduced in article 131 of our present constitution, means a right recognised by law and capable of being enforced by the power of the State. If such a right is involved in a dispute between two or more sovereign authorities in India, it is a dispute which can be entertained by the Supreme Court in the exercise of its

original jurisdiction except where such jurisdiction has been specifically barred by or under the constitution.

One or two commentators observe that the Supreme Court's original jurisdiction does not apply to a dispute, in which only a State is ranged against another State and to which the Government of India is not a party. They think that this exclusion of an inter-State dispute distinguishes article 131 from section 204 of the Government of India Act, 1935, which gave the Federal Court original jurisdiction over such dispute. There is no substance in this view. If the provisions of clause (c) of the article are read : carefully, the full significance and implications of the Supreme Court's original jurisdiction would be clear.

Disputes between individuals, between associations or local bodies *inter se*, or between individuals, on the one hand, and Governments, associations or local bodies, on the other, do not come within the purview of the original jurisdiction of the Supreme Court. Again, the Supreme Court cannot investigate a dispute arising out of any treaty or agreement to which a Part B State is a party, and which was entered into or executed before the commencement of the constitution and has since continued in force. The same rule applies to a treaty or agreement made before or after the commencement of the present constitution, and specifically excluded from its jurisdiction. The reservations made in regard to treaties or agreements furnish instances of a right recognised by law and capable of being enforced by the power of the State, but not through normal judicial process.

15. Different Kinds of Appeals to the Supreme Court

The Supreme Court's appellate jurisdiction in constitutional matters applies to an appeal from a judgment, decree or final order of a State High Court, and not from any other court or tribunal. If the judgment, decree or final order of a High Court involves a substantial question of law as to the interpretation of the constitution, an appeal lies to the Supreme Court on a certificate being given by the relevant High Court to that effect. Should

the High Court refuse to give the certificate the Supreme Court may grant special leave for appeal. It should, however, be remembered that the High Court's judgment, decree or final order might be one in a civil, criminal or other proceeding. This is analogous to section 205 of the Government of India Act, 1935, but with an important point of difference. That point is that no appeal lay to the Federal Court in the absence of a certificate from the High Court. Nor could the Federal Court grant special leave to appeal or direct the High Court to give the certificate as prescribed. It was open to the aggrieved party to seek remedy, by appropriate proceedings, before the Judicial Committee of the Privy Council. But in the absence of a certificate the Federal Court's jurisdiction was barred.

The question was debated in the case of *K. L. Gauba v. The Chief Justice and Judges of the High Court at Lahore (1941)*. The Federal Court held (i) that it could not question the refusal of a High Court to grant a certificate or investigate the reasons which had prompted the refusal ; (ii) that the matter was exclusively for the High Court to decide; (iii) that the Federal Court could not interfere with an order refusing a certificate even if the High Court had acted perversely or maliciously in withholding the certificate ; (iv) that a certificate was a necessary condition precedent to every appeal in such a case; and (v) that because the High Court had given no certificate no appeal lay to the Federal Court. This disability has been removed under the present constitution, so that if the High Court refuses to give a certificate, the Supreme Court may grant special leave to appeal. This seems to be a logical corollary to the elimination of the Judicial Committee as an instrument of final adjudication on appeal in Indian cases.

The interpretation of the constitution means the interpretation not only of the present constitution but of the Government of India Act, 1935, (including any enactment amending or supplementing that Act), or of any order or Order in Council made thereunder, or of the Indian Independence Act, 1947, or of any order made thereunder (article 147).

As to the civil appeal, (i) if the judgment, decree or final order of a High Court in a civil suit involves, according to the High Court's certificate, property of the value of not less than Rs. 20,000, an appeal lies to the Supreme Court. It lies also (ii) if the subject matter of the dispute in the court of first instance, say, a subordinate judge's court, and still in dispute on appeal, is or was of like amount. Further, an appeal lies, whatever the value of the property, (iii) if the High Court certifies that it is a fit case for appeal. If, however, in the first two instances the judgment, decree or final order appealed from affirms the decision of the court immediately below, an appeal lies to the Supreme Court, not as a matter of right, but only if the High Court, apart from certifying as to the value, also certifies that the appeal involves some substantial question of law. No civil appeal, however, lies to the Supreme Court from the judgment decree or final order of one judge of a High Court. Does this reservation apply to such a High Court decision even where it involves interpretation of the constitution ? The answer is, it does not. The reservation as contemplated in article, 133(3) does not govern or in any way affect the provisions of article 132.

The point was raised in *The Election Commission v. Saka Venkata Rao* (1953) as to whether any restriction was placed on the right of appeal in constitutional matters under article 132, having reference to the number of judges by whom such judgment, decree or final order had been passed. In other words, the question was whether appeal lay to the Supreme Court from a decision of a single judge, involving the interpretation of the constitution. The Supreme Court have answered the question in the affirmative. They hold that while constitutional questions could be raised in appeals filed without a certificate under article, 132, the provisions of that article make it clear that once a certificate is given the appeal lies, no matter whether it was a single judge or more than one judge that passed the judgment, decree or final order. Questions relating to the interpretation of the constitution are placed in a special category irrespective of the nature of the proceedings in

which they may arise, and a right of appeal of the, widest amplitude is given in cases involving such questions.

Appeal lies to the Supreme Court in criminal cases (1) where a death sentence has been passed by a High Court after setting aside an order of acquittal. Appeal also lies (2) if the High Court has passed a death sentence after having withdrawn for trial before itself any case from a subordinate court. In other matters, an appeal lies only (3) if the High Court certifies that the case is a fit one for appeal. Thus the Supreme Court, replacing the Judicial Committee, is a final court of criminal appeal to a limited extent. Its jurisdiction may, however, be extended by parliamentary legislation.

It should be noted that in every case of death sentence passed by a High Court, appeal does not lie, as a matter of right, to the Supreme Court. Suppose a person is convicted and given a death sentence by a sessions court. On appeal the sentence is upheld by the High Court. In such a case no appeal lies to the Supreme Court unless the High Court gives a certificate to the effect that it is a fit one for appeal, or the Supreme Court itself gives special leave under article 136. It should be clearly understood that the Supreme Court, like the Judicial Committee, does not, as a normal rule, intervene in criminal matters except where there has been a gross miscarriage of justice.

Apropos of the appeal in constitutional matters under article 132(1), the Supreme Court have held in the case of *Darshan Singh v. The State of Punjab (1953)* that the appellants are not entitled to challenge the decision appealed against on a ground other than that on which the certificate was given except with the leave of the Supreme Court as provided for under clause (3). Once that leave is granted the issue is at large, so that other grounds may be canvassed to repel the decision appealed against. A certain observation has been made by the Supreme Court, which is relevant to criminal appeals under article 134, or with special leave, under article 136. The observation is to the effect that the function of the Supreme Court, which is not an ordinary court of criminal appeal, is not so

much to weigh and appraise the evidence or to find out the guilt or innocence of the accused as to see that the accused gets a fair trial on proper evidence.

Apart from these different kinds of appeal, the Supreme Court have power, as has already been pointed out, to grant special leave in any case from any court or tribunal within the territory of India, except the military tribunals or courts.

16. The Significance of the Supreme Court's Writ Jurisdiction

As regards the writ jurisdiction, the Supreme Court's have power, that is, to issue writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warrant* and *certiorari*, whichever may be appropriate, or any other order or direction for the enforcement of the Fundamental Rights guaranteed under the constitution. Any body, who is affected by violation or breach of any of the Fundamental Rights, has direct access to the Supreme Court for any of these remedies. In a previous chapter these writs have been briefly explained.

But as it is widely believed, in my opinion quite rightly, that the writ jurisdiction, whichever court may be empowered to exercise it in appropriate cases, is likely to play an increasingly important role in the machinery of adjudication in our country, it seems essential that the matter should receive special treatment. The Supreme Court's jurisdiction in this regard is confined at present to the enforcement of Fundamental Rights. But Parliament may extend its scope to other matters. Parliament may also empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court for the time being in the matter of the enforcement of Fundamental Rights [article 32(3)]. The writ jurisdiction of every State High Court extends to Fundamental Rights as well to any other matter, but the power conferred on a High Court is not in derogation of the power exercisable, by the Supreme Court in this regard (article 226).

What was the position of the High Courts in this regard prior to the inauguration of the present constitution in January 1950 ? It was ruled by the Privy Council in the *Parlakimedi* case (1943) that the High Court of Madras had no power to issue what were known as high prerogative writs beyond the local limits of its original civil jurisdiction. The power to issue such writs within those limits was derived from the Supreme Court which had been exercising jurisdiction over the Presidency Town of Madras and which was replaced by the High Court created by Charter under the Act of 1861. What applied to the High Court at Madras applied equally to the High Courts of Calcutta and Bombay. But no other High Court in any part of India subsequently set up had power to issue such prerogative writs at all, except that *any* High Court was competent under section 491 Cr.PC to issue directions of the nature of *habeas corpus* within limits of its appellate criminal jurisdiction. A High Court's jurisdiction in this respect remains unaffected.

The new constitution has altered the old law in two ways. In the first place, it has placed all the High Courts on a footing of equality in the matter of issuing of writs, orders or directions, irrespective of what power or powers they did or did not exercise before. The result is that every High Court has power to issue writs or any of them or any other order or direction for the purposes specified in the constitution. Secondly, a High Court's power to issue such writs, orders or directions applies throughout the territories in relation to which it exercises jurisdiction, so that the old rule as to the applicability of the writ only within the local limits of its original civil jurisdiction in the case of each of the three High Courts of Calcutta, Bombay and Madras has been repealed.

From this it follows, negatively, that the writs issued by a High Court cannot run beyond the territories subject to its jurisdiction. It follows, again negatively, that the writs cannot be issued by it against a person or authority that is not amenable to its jurisdiction by reason of residence or location outside those territories. On these

grounds in the case of *The Election Commission, India v. Saka Venkata Rao* the Supreme Court have quashed the writ of prohibition issued by a Madras High Court judge against the Commission. The Commission was and is located at Delhi which is outside the territorial jurisdiction of the Madras High Court. The Supreme Court, differing from the Madras judge, have given no weight whatever to the contention that the aggrieved person was an inhabitant of Madras and that the cause of action arose in that State. In such and similar cases writs may issue from the Supreme Court only if the question of enforcing Fundamental Rights is involved.

It has already been pointed out that the Supreme Courts at Calcutta, Bombay and Madras, which were replaced, by Charters, by High Courts, had exercised the writ jurisdiction as the King's Courts. It is, however, necessary to bear in mind that the power to issue prerogative writs had formed no part of the regular original or appellate jurisdiction of the Court of the King's Bench. As the name implies, these prerogative writs had their origin in the exercise by the King of his common law prerogative of superintendence, direction and control over his officers and tribunals, and were issued on behalf of the Crown by the Court of the King's Bench. As Holdsworth in his *History of English Law* so aptly puts it, *habeas corpus*, that the King may know whether his subjects were lawfully imprisoned or not, *certiorari*, that he may know whether any proceedings commenced against them were conformable to the law; *mandamus*, that he may ensure that his servants did such acts as they were bound to do under the law; and *prohibition*, that he may require the inferior courts or tribunals in his realm to function within the limits of their respective jurisdictions.

In Britain these were the monarch's prerogative writs. Before the commencement of our new constitution such power as certain High Courts exercised was, subject to the statutory provisions, the King's power—the common law or prerogative power. After the commencement, to call the writs high prerogative writs, as some

judges sometimes do, is a mistake. These have ceased to be prerogative writs because prerogatives constitute the residuary of the Queen's common law rights and special powers, and our courts are no longer the Queen's Courts in any sense of the term. They are simply writs, orders or directions.

17. The Supreme Court's Reference Jurisdiction

The President may at any time refer to the Supreme Court for its opinion any question of law or fact. After such hearing as it thinks fit, it reports its opinion to the President. Treaties, agreements etc. which, as we have seen, are excluded from the purview of the Courts, may also be referred by the President to the Supreme Court for opinion. This may be called the Supreme Court's reference jurisdiction. This article practically reproduces, except as to the procedure of hearing and the delivery of the opinion, the provisions of section 213 of the Government of India Act, 1935. Provisions for the procedure of hearing and the delivery of any judgment or opinion are made in article 145. The question referred to the Court should be precise and exact and contain all the facts relevant to the reference. Again, no Chairman or member of a Public Service Commission may be removed save on report made to the President by the Supreme Court on a reference (article 317).

Though not formally binding on the President, the opinion expressed by the Supreme Court on any reference should be construed as being a declaration of law by the Supreme Court, and, therefore, binding upon all courts under article 141. To all intents and purposes, it is a decision of the Court; and all authorities, civil and judicial, shall act in its aid.

There is analogous provision in section 4 of the Judicial Committee Act, 1833, which says that the King may refer to the Privy Council "any such other matter whatsoever as His Majesty shall think fit". The House of Lords, as the highest appellate court in Britain, does not give advisory opinion. Nor is the opinion of the

Privy Council generally sought except on the issues arising outside Britain. In the USA there is no provision empowering the President to invite the Supreme Court to give opinion, and that Court has consistently shown its reluctance to offer any opinion on issues other than those involving the legal rights of litigants in actual suits or proceedings.

Following the American precedent the Australian High Court has taken the line that the function of the judiciary is the determination of matters *inter parties*, and not the consideration of hypothetical questions or abstract legal principles. In Canada, on the other hand, the Governor-General is empowered by the Supreme Court Act of 1906, to refer to the Supreme Court important questions of law for hearing and consideration. The Supreme Court is bound to entertain the reference and give its opinion on the issues raised in the reference. The view has, however, been expressed by the Judicial Committee in several cases that "it is undesirable that the Court should be called upon to express opinions which may affect the rights of persons not represented before it, or touching matters of such a nature that its answers must be wholly ineffectual, with regard to parties who are not and cannot be brought before it." These considerations, it seems, do not apply to the Indian Supreme Court's reference jurisdiction in view of the constitutional provisions and the relevant rules made by the Court.

18. The Composition and Functions of State High Courts

There is a High Court for every State. It should not be confused with the State machinery of justice in the USA as distinct from its federal courts. With appropriate modifications the provisions as to the mode of appointment, removal, tenure, the taking of oath or affirmation and other amenities or disabilities for the Supreme Court judges apply to the High Court judges also. There are, however, several points of difference. First, a person is not eligible for appointment as a High Court judge unless he has held a judicial office in

India for at least ten years or has for the same period been an advocate of a State High Court [article 217 (2)]. Second, a High Court judge holds office until he attains the age of sixty years. Third, the appointment of a judge must be made by the President in consultation with the chief justice of India, the Governor or Rajpramukh of the relevant State, and, in the case of a judge other than the chief justice, the chief justice of the High Court. Fourth, the number of judges of a High Court may, within the prescribed maximum, be such as the President may deem it necessary to determine from time to time (article 216). Fifth, a High Court judge may be transferred by the President, in consultation with the chief justice of India, from one High Court to another within the territory of India (article 222). Sixth, there is no provision for the appointment as a High Court judge of a 'jurist' in the sense used in connection with the appointment of Supreme Court judges.

Both the chief justice of India and the chief justice of a State High Court may, with the consent of the President, request retired judges to act as judges of their respective courts. In the case of the Supreme Court, the retired judge so requested must have held the office of a Supreme Court or Federal Court judge. In the case of a High Court, he must have held office of a High Court judge. There is, in addition, provision for associating with the work of the Supreme Court *ad hoc* judges to be drawn from High Court judges, with the consent of the President and after consultation with the chief justice of the High Court concerned. This applies only when there is no quorum for the Supreme Court (articles 127, 128 & 224).

The old jurisdiction of each High Court is continued. Therefore, it possesses appellate jurisdiction in both criminal and civil matters. In Calcutta, Bombay and Madras the High Courts exercise original criminal and civil jurisdictions within the limits of what were known as Presidency towns. But the restriction to which the exercise of a High Court's original jurisdiction in respect of any revenue matter was previously subject has been removed (article 226), thereby

extending its jurisdiction in an important respect. A further instance of extension of jurisdiction is furnished by article 227. It has powers of superintendence, as under the Act of 1935, not only over all courts subject to its appellate jurisdiction, but over all tribunals within its territorial limits except the military tribunals. Besides, the restriction, imposed by the Act of 1935 to the effect that a High Court could not question any judgment of any inferior court which was not otherwise subject to appeal or revision, has been omitted. So a High Court is now competent to intervene, as in several well-known cases it did intervene under the Government of India Act, 1919, and under previous statutes, in the judgments or decisions of inferior courts, notwithstanding that they are not normally subject to appeal or revision.

A High Court may at present revise, on its own initiative or otherwise, orders or decisions of courts as well as of tribunals, and of those officials who act or purport to act as tribunals. This is in addition, it must be remembered, to its power to issue any direction, orders or writs under article 226 for the enforcement of Fundamental Rights or for any other purpose. Furthermore, if a High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of the constitution, it shall withdraw the case. The case thus withdrawn may then be disposed of by it or it may proceed to determine the question of law and return the case together with a copy of its judgment on such question. The subordinate court is then bound to dispose of the case in accordance with the High Court's judgment (article 228).

A like power was exercisable by a High Court under section 225 of the Act of 1935, but only where the interpretation of a Central or Provincial Act was involved, and on an application made, in relation to the former, by the advocate-general of India, and, in relation to the latter, by him as well as by the advocate-general of the Province. No such application is necessary under our present constitution, nor is the intervention of a High Court

restricted to cases in which only the interpretation of the Acts of the legislatures is involved.

Parliament may by law extend the jurisdiction of a High Court. The extension of the jurisdiction of the High Court of Calcutta to the Andaman and Nicobar Islands and the extension of the Madras High Court's jurisdiction to Coorg may be cited as examples. Parliament may also exclude the jurisdiction of a High Court from any State other than, or any area not within, the State in which it has its principal seat.

19. The Subordinate Judiciary

Below a High Court and subordinate thereto, there is a long and complicated hierarchy of the judiciary spread over the districts and rural areas, exercising both civil and criminal jurisdictions. Most of the courts within this hierarchy are courts of first instance as, for example, munsifs on the civil side and magistrates on the criminal side. Appeals from these courts lie to district judges, or judges subordinate to him on either side of the appellate jurisdiction. In certain respects as, for instance, in sessions cases or in suits involving claims or property of value above a prescribed sum, these judges have original jurisdiction as well. There are, in addition, honorary magistrates and, in the rural areas, union benches and courts. These magistrates deal with original criminal cases, whereas the union benches and courts handle petty criminal and civil matters respectively.

District judges are appointed by the Governor or Rajpramukh of a State in consultation with the High Court exercising jurisdiction in relation to such State. The posting and promotion of such judges are also made in like manner. A person, not already in the service of the Union or of the State, is eligible for appointment as a district judge only if he has been an advocate or a pleader of seven years standing, and is recommended by the relevant High Court for the purpose.

Appointments of persons other than district judges to a State's judicial service such as subordinate judges and

munsifs, are made by the Governor or Rajpramukh in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and the State High Court. Consultation with the State Public Service Commission is not required in the case of appointment of district judges. The control over district as well as subordinate courts is vested in the High Court. So also are posting and promotion of, and the grant of leave to, judicial officers holding posts inferior to that of a district judge.

The expression 'district judge' includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge. The expression 'judicial service' means a service consisting exclusively of persons intended to fill those posts and other civil judicial posts inferior to the post of a district judge. Thus a distinction is made between district judges and other judicial officers (Part VI, Chapter VI).

The Governor or Rajpramukh of a State may direct by notification that the provisions of the constitution relating to the subordinate courts and any rules made thereunder shall, with effect from such date as may be fixed by him in that behalf, apply in relation to any class or classes of magistrates, subject to such exceptions and modifications as may be specified in the notification. The 'subordinate courts' referred to in the constitution means the subordinate civil judiciary. It is contemplated that the Governor or Rajpramukh, as the case may be, may bring any class of the magistracy within the purview of these provisions with a view to removing them from executive control in accordance with the principle of separation of judicial from executive functions as enunciated in article 50.

20. Meanings of the expressions '*beyond jurisdiction*' '*illegality*', '*ultra vires*' etc

One must have noticed that the expressions such as *beyond jurisdiction*, *illegality* and *ultra vires* are frequently

used in any literature bearing on constitutional law. In this and in several other chapters of this book also reference has been made to these terms. A few words clarifying their meanings seem relevant in the present context. The word 'jurisdiction' is technically limited to the exercise of a power connected with litigation, and is exclusively confined to the powers of a court of law or of a tribunal, civil, criminal or other. Ordinarily, a Governor, for instance, has 'powers' whereas a High Court has 'jurisdiction'. But in the case of a High Court and, for that matter, of any other court, 'jurisdiction' is not exactly the term that is to be used when it makes rules in exercise of the power conferred upon it by statute or order. It is an exercise of 'power' and not of 'jurisdiction'.

The question of *intra vires* or *ultra vires* comes in when, an authority acts within or without its power. If a State legislature enacts legislation as to defence, which is within the exclusive power of Parliament, the legislation is *ultra vires*, that is, in excess of power. Conversely, if it enacts legislation in respect of agricultural holdings, the legislation is *intra vires*, that is, within power. An act or proceeding may at once be *illegal* and *ultra vires*, but it may also have one defect without the other. A Bank has no power to engage in benevolent enterprises. A subscription made, by authority of the Board of Directors of a Bank and under its corporate seal, for the building, say, of a temple or college clearly would be *ultra vires*, but it would not be *illegal* in the proper sense of the term. Sometimes an *illegality* may be *intra vires*. It is *intra vires* a trade union properly constituted to give its members a call for a strike for the purposes specified in the relevant Act, but a strike without due notice is an *illegality*, though not, strictly *ultra vires* the powers conferred upon it by statute. It should be remembered, however, that these distinctions are not closely observed in text-books or in decisions of courts of law.

Illegality as Street points out in his *A Treatise on the Doctrine of Ultra Vires* (p. 5), is used to signify matters widely different. It denotes (i) matters which are, or are

in the nature of, torts; (ii) proceedings which are vitiated by reason of duress, undue influence, etc.; (iii) arrangements or acts contrary to 'public policy'; (iv) matters which are forbidden by statute, but may not be otherwise objectionable; (v) breaches of contract; (vi) breaches of trust; and (vii) *ultra vires* proceedings. In a strict sense, the term *illegality* is applicable only to the first four. Sometimes it is extended to (v) and (vi) as well. But so far as the last item is concerned, very often a distinction is maintained between true *illegality* and what is merely *ultra vires*.

21. The Organisation of the US Judiciary

There should be no confusion as to our judicial system. Here a few words of caution are needed. Ours has been called by certain experts, including Dr. Ahmedkar, an integrated judicial system. To be more precise, it is a unitary whole. There is no judicial dualism in our country as in the USA. In the latter country there are two sets of Courts, not parallel courts in the real sense of the term, and yet not organs of a common judicial hierarchy. In the federal hierarchy they have (1) the Supreme Court; (2) Circuit Courts of Appeals; and (3) District Courts. Its State counterpart is represented by (i) the Supreme Court ; (ii) Appellate Courts; (iii) Courts of General, Original jurisdiction such as courts of common law, courts of equity, criminal courts and probate courts; (iv) County, District, Circuit and Municipal Courts; and (v) Justices of the Peace and Police Courts. Besides these two broad categories of courts (Federal and State), there are special courts for special purposes in the nature of administrative tribunals. These tribunals do not strictly follow legal formulas or procedures which one associates with regular courts of law.

Federal district courts are exclusively concerned with the original jurisdiction, whereas the circuit courts of appeals are exclusively appellate courts. Primarily and essentially an appellate court, the Supreme Court also exercises certain original jurisdiction. That jurisdiction extends, as is laid down in article III, section 2 (2), to cases affecting ambassadors, other public ministers and

consuls. It further applies to cases to which a State shall be a party. The law as originally made in regard to a suit in which a State was involved has been modified by the Eleventh Amendment passed in 1794 and ratified in 1798. The Amendment provides that the us judicial power shall not be construed to extend to any suit in law or equity, commenced or prosecuted against a State by citizens of another State, or by citizens or subjects of any foreign State. In the case of *Chisholm v. Georgia* (1793) the Supreme Court heard a suit instituted against the State of Georgia by a citizen of South Carolina, and the Amendment owes its origin to the controversy provoked by the Supreme Court's intervention. The law as modified excludes from the jurisdiction of the Supreme Court and, for that matter, all Federal courts any case or suit initiated against a State by a citizen of another State or of a foreign State. No State may be sued or proceeded against without its consent in the US Supreme Court in the exercise of its original jurisdiction.

In all cases other than those mentioned above, the Supreme Court exercises appellate jurisdiction, both as to law and to fact. The bulk of the cases dealt with by that Court are appeals, either from the decisions of the subordinate Federal Courts or from the highest State Courts. Ordinarily, the appeals are finally disposed of by the appropriate circuit court of appeals. In cases where the lower appellate court gives a certificate as to conflict of opinion, appeal lies to the Supreme Court. Further, the Supreme Court may take a case on appeal by recourse to the writ of *certiorari*. As a rule, no direct appeal lies from a district court to the Supreme Court, bypassing the intermediate stage of appeal provided by the circuit Courts. Exceptions to this rule are, however, made in the case of some of the federal regulatory commissions.

So far as appeals from the decisions of the State Courts are concerned, one must notice that those decisions may involve (i) rights vested under the constitution, the federal laws or treaties; (ii) conflicts between a State constitution

and a State law, on the one hand, and the US constitution, the federal laws and treaties, on the other; and (iii) private disputes under the common law, criminal cases and similar other proceedings. As to the first two categories of decisions, which are known as 'federal question' cases, appeal lies to the US Supreme Court whose function is to protect the constitution not merely by interpretation but also by judicial review. In regard to the third category of decisions, the Supreme Court determines in its discretion which of them it should entertain itself and which others should be disposed of by the circuit courts of appeal.

Since 1925, when the *Judges Bill* was passed, the tendency has been to limit the appellate jurisdiction to cases involving questions of the highest public import. What were previously mandatory appeals have now become discretionary appeals. Appeals which earlier came before the Supreme Court as a matter of right may or may not be admitted now in the exercise of its discretion. With the increasing growth of federal power under the impact of modern social and economic forces the old dualism of the American judicial system is, however, shedding its original colour, and the unmistakable trend is one of integration rather than one of devolution or decentralisation.

22. The Swiss Judicial System

The Swiss Judicial pattern, following closely its political structure, is somewhat different. Judges of the Swiss Federal Tribunal are appointed by the Federal Assembly which corresponds to our own Parliament, to the US Congress or to the Supreme Soviet of the USSR. In making these appointments regard must be had to the representation of the three national languages. The terms of office and emoluments are determined by law (article 107). The Tribunal is required to administer justice in federal matters. It has jurisdiction in civil disputes as well as in penal cases.

In civil matters the disputes must be (i) between the confederation and the cantons; (ii) between the confederation of one part, and corporations or individuals of the other part; (iii) between cantons; and (iv) between

cantons of one part and corporations or individuals of the other part. In penal cases the trial is by jury, and the Tribunal's penal jurisdiction extends to (i) cases of high treason against the confederation; (ii) crimes and offences against the law of nations; (iii) crimes and offences involving disorders which necessitate the intervention of the federal armed forces; and (iv) charges against federal officials when brought before it by the appropriate federal authority (articles 106, 110 and 112). It has also jurisdiction in the matter of loss of nationality and of disputes between cantons concerning the right of citizenship of a commune. Again, conflicts of jurisdiction between federal authorities of the one part and the cantonal authorities of the other part, disputes between cantons in matters of public policy, and complaints of violation of the constitutional rights of citizens and complaints by individuals of violation of concords and treaties fall within its jurisdiction (article 113). Besides, as in our country, additional jurisdictions may be conferred upon the Tribunal by legislation enacted by the Federal Assembly (114). Subject to the federal law, administrative disputes are excluded from its jurisdiction. These disputes are usually dealt with by the Federal Administrative Court, practically in the same manner as in France, but subject to federal legislation.

Certain points may be deduced, by way of comparison and contrast with our system, from these provisions of the Swiss Constitution. First, the Federal Tribunal is not an appeal court, unlike the USA Supreme Court and our own. It is mainly concerned with the original jurisdiction in regard to certain specified matters. Second, unlike our Supreme Court, it entertains original suits or cases in which, individuals or corporations as distinguished from the sovereign authorities are involved. Third, the entire field of judicial adjudication in regard to both original and appeal cases is left to the cantons or communes save where the parties or matters, as specified in the constitution or by federal law, are concerned. Broadly speaking, constitutional and political disputes come within the jurisdiction of the Tribunal; and that jurisdiction is original, and not appellate

jurisdiction. The disputes may be civil or criminal. Thus we have in Switzerland a typical example of judicial dyarchy.

23. The British Juridical Monism

The principle of monism is inherent in the English judicial structure, although there was, right up to the middle of the nineteenth century, a good deal of confusion as to the jurisdictions of different kinds of courts. This is largely to be accounted for by the circumstances in which the system has developed over a long period of centuries. By the Judicature Act, 1873, which was put into operation two years later, an attempt was made to remove the confusion by amalgamating the superior civil courts and the courts of assize into the Supreme Court of Judicature consisting of two divisions, namely, the High Court of Justice and the Court of Appeal.

Originally the High Court had five divisions which have now been reduced to three: (i) Queen's Bench; (ii) Chancery; (iii) Probate, Divorce and Admiralty. Judges of this Court are appointed by the Crown on the recommendation of the Lord Chancellor, who is both a political and judicial officer. Any judge of the High Court may sit in any division, which is competent to give any remedies that may be available on the basis of common law or of equity.

The Court of Appeal sits in two divisions of three judges. Although the judges of this Court include the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, ex-Lord Chancellors, five Lord Justices of Appeal and several others-all appointed by the Crown on the recommendation of the Prime Minister-its work is usually done by the Master of the Rolls and the five Lord Justices of Appeal, who may be assisted by the judges of the High Court. Appeal lies from any Division of the High Court to the Court of Appeal except where it is restricted, limited or barred by statute. The decision of a Divisional Court on appeal from a county court is not subject to appeal to the Court of Appeal unless the Divisional Court or the Court of Appeal gives special leave to appeal.

It is clear that the High Court is not solely concerned with original suits or proceedings. It has original jurisdiction all right, for instance, in common law and equity cases and in maritime and divorce matters; but the Queen's Bench Division, like our High Courts, has appellate jurisdiction too and, besides, is empowered to supervise and control subordinate courts and judicial bodies by means of the prerogative writs. Direct appeals from the county courts lie to the Court of Appeal, and not *via* a Divisional Court of the High Court, in disputes arising out of the Agricultural Holdings Act, 1923, and the Workmen's Compensation Act, 1925. From a decision of the Court of Appeal an appeal lies to the House of Lords, which, in addition to its ordinary appellate jurisdiction in civil suits and its extraordinary appellate jurisdiction in criminal cases, possesses original jurisdiction in impeachment proceedings and in trials of peers accused of treason or felony.

What, however, is important in modern times from the juridical point of view is not the House of Lords as a court of the first instance but the House of Lords as the highest appellate court in Britain. But its judicial functions are not exercised by the whole House. Usually they are taken up by the Lord Chancellor, the Lords of appeal in ordinary, ex-Lord Chancellors and other peers who have held high judicial office. The House of Lords is bound by its own decisions, unlike our Supreme Court which has power, on the analogy of the Judicial Committee, to review its own judgment or order. Like the House of Lords but unlike the Judicial Committee, the judges of our Supreme Court may give dissenting opinions. The fount and source of justice in Britain is the Crown, and never has the, juridical monism in theory and in practice been open to doubt or challenge in all the ramifications of the adjudication machinery.

24. The Peculiar Pattern of Soviet Law and Justice

Students of law and jurisprudence, legal institutions and constitutional maxims do not generally find it much too difficult to discover the core of the systems prevalent in

America, in Britain or even in Switzerland. There may be differences in procedures as well as in the structural designs, but one basic approach in each case, it is believed, constitutes the essence of law and justice in the so-called western democracies. Difficulties arise when one proceeds to examine the Soviet system and the foundations on which it rests. One is at once confronted with a new pattern of values, which naturally sounds strange to men and women who have known only of other values and been long accustomed to those values. In essence, however, the Soviet concept of justice is no new social phenomenon in the history of human civilisation. In early societies, eastern or western, justice was simple, popular and nevertheless effective. Justice was applied law; and the law embodied the desires, wishes and needs of a simple and unsophisticated people, who were concerned more with the harnessing of nature to their use than with the surplus value of the ruled, conquered and enslaved.

The Soviet system has only given an organised expression to that ancient sense of values amongst a vast mass of humanity. It does not mean that there has been no change in the ancient pattern of law and justice. Indeed significant changes have taken place in response to the complexities of modern society and to new and diverse types of social relations which were unknown to the early founders of social institutions. Against this historical and material background only the Soviet planning for law and justice, which is part of its wider planning for freedom from hunger and misery, from fear and anxiety, can be understood and appreciated.

There is no vesting of the judicial power, as in the USA, in a certain superior court and a number of other courts manned by members of a professional class, who are nominees of the executive. In the USSR, as the law says, justice is administered by the Federal Supreme Court, the Supreme Courts of the Union Republics, the Territorial and the Regional Courts, the Courts of the Autonomous Republics and the Autonomous Regions, the Area Courts, the Federal Special Courts and the People's

Courts (article 102). In all courts cases are tried with the participation of people's assessors, except in cases otherwise provided for by law (article 103). The first point that would strike a foreign observer is the provision for popular participation in the administration of justice. This is achieved in two ways: (i) by the institution of people's courts, and (ii) by the association of assessors in all stages of judicial adjudication from the base to the top.

The people's court, which is at the base, is a court of the first instance and is in daily contact with the people. It is, elected for a three-year term by citizens of the district by secret ballot on the basis of universal suffrage (article 109). A large majority of civil and criminal matters, including disputes involving the electoral rights of the citizens, fall within its original jurisdiction. Citizens may lodge complaints against decisions of the Soviets alleging that names of eligible persons have not been entered, or have been entered incorrectly in the voters' list, and a people's court gives decisions. Divorce proceedings are initiated in a people's court and generally disposed of by it in the first instance. A people's judge is required to render an account of his work and of that of the people's court to the electors.

Appeal lies from the decisions of a people's court to the appellate court of the region, territory or area. The decisions of the latter court, in the first instance, are subject to appeal to the Republic Supreme Court. In Autonomous Republics for the decisions taken in the first instance by a people's court and for those taken in the exercise of its original jurisdiction by an Autonomous Republic Supreme Court, the appellate courts are respectively the Autonomous Republic Supreme Court and the Union Republic Supreme Court.

There is no appeal from the decisions of the Union Republic Supreme Court sitting as a court of original jurisdiction. But if in individual cases it is established that the questions raised have been incorrectly decided in the courts exercising original and appellate jurisdictions,

the USSR Supreme Court may intervene provided there are protests against the decisions or orders by the USSR Public Prosecutor or by the President of the USSR Supreme Court. To this may be added its appellate jurisdiction in respect of sentences pronounced by military tribunals or by courts of railroad and water transport lines. Apart from these two types of appellate jurisdiction, the Union Supreme Court exercises original jurisdiction in all criminal and civil matters of all-Union importance.

Not to speak of the people's courts, the tribunal and area courts, the courts of the Autonomous Regions, the Autonomous Republic Supreme Courts, the Union Republic Supreme Courts and the Supreme Court of the USSR are all elected by the deputies of the appropriate Soviets for a term of five years. And so are the special courts of the USSR (articles 105-108). This is another feature which distinguishes the Soviet system from the British, American and Indian systems. Judges are independent but subject to the law (article 112). Judges as well as assessors may be recalled in accordance with a decision taken by the electors, or upon a judicial verdict after trial. In all courts except where otherwise provided for by law the cases are heard in public. The accused is guaranteed the right to be defended by counsel (article 111).

The appellate jurisdiction of the courts exercising such jurisdiction is generally exercised by three permanent judges, whereas their functions as courts of original jurisdiction are discharged by a tribunal consisting of the President (a member of the court) and two of the people's assessors elected for a five-year term by the corresponding Soviets. All questions are decided by a majority vote, and the vote of the President is of the same legal or practical significance as that of a people's assessor.

The USSR Supreme Court acts through five collegia : (i) the collegium for criminal affairs; (ii) the collegium for civil affairs; (iii) the military collegium ; (iv) the railroad collegium; and (v) the water transport collegium. The collegium principle is followed, with necessary modifications, in other courts also.

There is another peculiar characteristic of the Soviet juridical system to which attention may be invited. As we all know, the normal rule in Britain and America and also in our country is that the appeal court does not generally go into the facts of the case but is concerned, more or less, with the points of law. In the Soviet Union, by contrast, the superior court is required to examine and verify all questions of law and of fact raised or involved in the appeal. It shall, that is, go into the fundamental soundness of the decision appealed against in substance as well as in form.

25. A Comparative Study of the Soviet and Indian Systems

Now, it may be contended that with the exception of choosing judges by election, we have in our country analogous provisions for popular participation in the functioning of justice, for instance, the taking of decisions by union benches and union courts in the rural areas, and the association of jurors or assessors with the courts in certain types of criminal trials. This claim requires to be carefully examined. What are union benches and union courts ? What are their functions ? It is for the appropriate State Government to decide whether within a union board a bench should or should not be constituted. The people or the voters have no say in this regard.

Should the Government be pleased they may appoint any two or more of the members of a union board to be a union bench for the trial, in the whole or any part of the union, of certain petty offences relating to cattle trespass and ferries and such other matters. In regard to certain other offences under the Indian Penal Code, the cases may be transferred to the bench by a district magistrate, sub-divisional officer or any other magistrate empowered to receive petitions under a certain section of the Cr.PC. In any event, the value of the property involved in the case must not be more than twenty rupees. Further, the bench may only try offences punishable with fine upto a limit of twenty five rupees. Power is reserved to the district magistrate or sub-divisional officer to transfer any case

from one union bench to another or to any other court subordinate to him. Normally, there is no appeal by a convicted person in any case tried by a bench. But the district magistrate or subdivisional officer may, of his own motion, or on the application of the parties, cancel or modify any order of conviction or compensation made by a bench or direct the retrial of any case by a court of competent jurisdiction subordinate to him.

A union court may also be constituted by the State Government in the same manner as a union bench. It may decide civil suits involving petty matters. In any case, the value of the suit must not exceed two hundred rupees. On the application of any defendant a court of small causes or a court of the munsif (the lowest civil court) is bound to withdraw the suit from a union court for trial by itself when its value exceeds twenty five rupees. When its value does not exceed that sum the civil court may or may not withdraw it. Here also there is no provision for appeal from a decision of the union court. But on the application of any party to the suit the district judge may cancel or modify the order of the court, or direct a retrial of the suit by the same or any other union court or by any other court subordinate to him (The Bengal Self-Government Act as modified up to June, 1950. Part II. Chapter VII).

It is not fair to compare these petty benches and courts, whose composition is determined by the executive and whose powers and jurisdictions, limited as they are, are subject to control and supervision by magistrates and munsifs respectively, to the people's courts in the USSR, who are elected by the people and who decide matters of high public import. Nor does the agency of criminal justice constituted of honorary magistrates provide any analogy. They are chosen by the bureaucracy from amongst persons who possess property and are amenable to political or executive control. They have little or no contact with the people.

26. Trials by Jury

As to the association of jurors or assessors with the regular courts in the administration of justice in capitalist

countries, Vyshinsky writes that the classical form of the bourgeois court is "the court with jury" and that in such a court the jurors (ordinarily twelve) decide the guilt of the accused, and, on the basis of that verdict, the permanent judges apply the law and award the punishment. According to him, in the period of flourishing bourgeois democracy such a court served as a bulwark of freedoms proclaimed by the bourgeoisie in the course of their struggle against the landowner class with the support of the broad masses. But the jurors have all the time been defenders of that order of social relations which sustains them or keeps them going.

The opinion expressed by Vyshinsky may create the impression that jurors in capitalist countries decide cases and determine the sentences. That, however, is not the case uniformly. About the composition of the jury and their functions, there should nevertheless be no doubt or confusion. In Britain all criminal cases are tried with the help of the jury save those tried at petty sessions. An ordinary jury, which consists of twelve persons, must be distinguished from a grand jury which consists of not less than twelve and not more than twenty-three persons. Originally it was for a grand jury to present to the court any criminals in their neighbourhood. That is no longer its function. What they do now is to tell the court, after a preliminary enquiry, whether there is a *prima facie* case against the persons committed for trial by magistrates or, in the case only of murder or manslaughter, also by the coroner's courts. Bills of indictment, stating the charges against the alleged offenders, are presented to them, and then if in respect of any Bill they are satisfied that the prisoners must answer the charges, they find a true Bill. Unlike the petty jury, in whose case unanimity is required, the grand jury may decide by a majority.

In the USA also, as in Britain, there are trial or *petit* juries as well as grand juries. The trial jury, as in Britain, consists of twelve persons, and the verdict too must be unanimous. That is the rule in Federal as well as in State courts. In regard to the grand jury, again, the American law corresponds in all essentials to the British. The number

varies from twelve to twenty-three persons summoned by the Government to bear witnesses on their behalf. They may decide by a majority. They return indictment against persons who, in their opinion, must face trial except, of course, in cases affecting or involving military law. In Federal Courts offences punishable with imprisonment for one year or more are dealt with by the grand jury. In most of the State courts an indictment by the grand jury in serious crimes is required, but indictment by an information is also permitted. It means that a person may be charged by the prosecutor and the trial magistrate may be satisfied, on *prima facie* evidence, that there is a case against the accused. Thus in the preliminary stage the trial magistrate steps into the shoes of the grand jury. In the case of *Hurlado v California* (1884) while observing that the trial by the grand jury was the ancient and customary method, the Supreme Court held that a new method could not and should not be overruled provided that it afforded an equivalent justice.

In India all trials under Chapter XXIII Cr.PC before a High Court shall be by jury. In cases transferred to them the trial may be by jury if they so direct. All trials before a court of session shall be either by jury, or with the aid of assessors. The Government of a State have power to direct that the trial of all offences or any particular class of offences before a Court of session shall be by jury in any district. In cases where the trial is to be by jury in any district, the jurors may be summoned from a special jury list provided that the judge so directs and the State Government issue an order accordingly.

The clerk of the State prepares, subject to rules made by the appropriate High Court, (i) a list of persons liable to serve as common jurors, and (ii) a list of persons to serve as, special jurors only. Regard must be had, in the preparation of the special jurors' list, to the property, character and education of the persons whose names are entered therein. These two lists of jurors are for High Courts. As regards other jurors and assessors, the sessions judge and the collector of the district prepare a list of

persons liable to serve as jurors or assessors. Where it is decided that in a district the trial shall be by a special jury, a list of special jurors is prepared by the sessions judge and the collector, taking into consideration the property, character and education of the persons concerned.

If in any case the accused person is charged with having committed an offence punishable with death, the jurors in a trial before a High Court must be chosen from the special jury list. In any other case the High Court judge concerned may direct the trial by a special jury. In any district where special jury trials have been ordered, the sessions judge may direct that a particular trial shall be by a special jury. In trials before a High Court the jury shall consist of nine persons. In trials by jury before a court of session in the district the jury shall consist of not less than five or more than nine persons. In capital sentence trials, however, the number must not be less than seven, preferably nine. When the trial is held with the aid of assessors the number must not be less than three, preferably four.

If the jury is unanimous in a High Court trial the judge must give his judgment in accordance with the verdict of the jury. If, however, six of the jurors are of one opinion, then the judge may agree with them and pronounce his judgment accordingly. The law is different in the case of trials before a court of session in the district. Even the unanimous verdict or the majority verdict of the jurors is not binding on the judge. In cases of disagreement with the jury the judge must submit the case to the High Court, stating the grounds of his opinion. In dealing with such a case the High Court may exercise any of the powers which it may exercise on appeal. In trials with the aid of assessors, the judge is not bound to conform to their opinion, unanimous or divided.

Certain points emerge from the law and practice observed in our country, and, on the whole, in Britain and in the USA. First, the jurors or assessors are not people's men, but are nominated by the bureaucracy and susceptible to all kinds of bureaucratic pressure. Second, the qualifications as to property, education and character,

required in the case of special jurors, constitute an effective protection of vested rights as against the claims of the ordinary masses. Third, the opinion of the assessors may not count at all in any case triable with their aid. Fourth, even the verdict of the jurors in trials before courts of session may be overruled, subject to submission of the cases to the relevant High Court. Only where the verdict is unanimous in a trial before a High Court the judgment cannot go against that verdict. Here also, as in the case of the so-called popular union benches or courts, the system prevalent under our law or under the law and practice in Britain and the USA bears no comparison whatsoever to the pattern of popular administration of justice in the USSR.

27. The Illusion about Judicial Independence and Impartiality

There is a good deal of superstitious reverence for the professional judges and the professionalised judicial machinery in our country. That the professional judges are by no means omniscient or even competent, by education or training, to handle efficiently and adequately all the complex questions of our time has been demonstrated during the last half a century by the institution of special tribunals set up from time to time for specific purposes. Again, if the independence and impartiality of the judges cannot be secured and ensured, as is admitted even in bourgeois circles, save by scales of salaries, securities of tenure and other guarantees which the impoverished taxpayers can hardly afford, surely in a poor country like ours the judicial system calls for an overhaul not only from the point of view of its institutional form but, what is more important, from the point of view of its social basis. In our present setting justice is dilatory and expensive and, as between the ruling classes and the ruled, not always above suspicion.

It must, however, be admitted that the higher judiciary in our country have, on the whole, maintained and are maintaining a record which, within the obvious legal or other limitations of the system, is creditable.

That is nevertheless no solution of the problem, and the need of the common folk is democratic justice, that is, justice with which they are themselves associated, which does not deny them what legitimately is their due and to which they may have easy access, irrespective of their financial competence. But then it raises a larger and more complicated problem, which is one of reconstruction of social relations. For, law and justice must necessarily conform, in the last analysis, to the ethical and social norms of the ruling class or classes. In the USSR the law and justice are such as are determined by the toiling men and women. In our country and also in Britain and in the USA, by contrast, the law and justice cannot but be attuned to their respective patterns of private property relations.

CHAPTER XIV

CONSTITUTIONAL AMENDMENT

1. Method and Process of Change

Attention is now invited to the manner in which, and to the processes through which, our constitution may be modified or amended. These may be briefly discussed. Should the Government of India, for instance, decide that some action should be taken to increase or diminish the areas of a State, or to alter its boundaries, a Bill in that behalf has to be passed by Parliament. If, again, they propose to abolish an existing State Council or to set up a Council in a State, where it does not at present exist, in accordance with the wishes expressed in a resolution of the appropriate State Assembly, then Union legislation to that effect has to be enacted. These and similar other measures, to be sure, are modifications of the existing constitutional provisions. But they are not treated as amendments of the constitution in the technical sense, that is, for the purposes of article 368. Laws embodying those changes may be passed by Parliament by a simple majority vote in both Houses in just the same manner as an ordinary Bill is passed. Matters, in respect of which modifications of this type may be made, are specified in the constitution.

The same procedure applies to legislation concerning citizenship. That legislation may or may not involve a change in the constitutional provisions on the subject brought into force at the commencement of the constitution. Whatever its nature and scope, it will not be regarded technically as a constitutional amendment. These together constitute the first type of amendments contemplated in the constitution. But the constitution says that these shall not be called amendments. One may call them changes, alterations or modifications, but not amendments.

2. Two Categories of Constitutional Amendments

To the second type of amendments belong amendments, changes or modifications of the constitution other than those referred to above. These are amendments of the constitution in the technical sense. These, again, are classified into two categories. The first category of these amendments does not, in any way, affect the rights, powers, status, functions and interests of Part A and Part B States. For any of such amendments a Bill must be passed by a majority of the members of each House of Parliament, being not less than two-thirds of the members present and voting in each House.

The majority contemplated is worked out thus: Suppose each House of Parliament consists of 600 members of whom 550 are present and 501 only take part in voting. What is the requisite majority in this case ? Votes cast for the proposed legislation by 301 members in each House, who constitute a majority of the House, are not sufficient for the purpose. The number of votes must be two-thirds of the members *present and voting*, and the members *present and voting*, in this case are 501, and not 600 or 550. Two-thirds of 501 is 334. If the votes cast for the legislation are equal to that number, then the requisite majority is secured, because it constitutes not only (i) a majority of the whole House but (ii) two-thirds of those present and voting. Suppose, on the other hand, the number of members present and voting is 420. Two-thirds of this number is 280, but it is not a majority sufficient for the purpose. It does not fulfil the other criterion, namely, a majority of the total membership of the House. The requisite majority in this case is 301, which satisfies both the tests, that is. (i) a majority of the whole House and (ii) two-thirds of the members present and voting. This special, majority, rule applies to both the Houses of Parliament.

To the second category of constitutional amendments belong amendments affecting or concerning the following :

- I. The election of the President (article 54) ;
- II. The voting at the Presidential election (article 55);
- III. Extent of the Union's executive power (article 73);

- IV. Extent of a States's executive power (article 162);
- V. Constitution of High Courts for Part C States (article 241);
- VI. The Union Judiciary (Part V, Chap. IV) ;
- VII. State High Courts (Part VI, Chap. V) ;
- VIII. Distribution of Legislative Powers (Part XI, Chap. I; and any of the Lists in the Seventh Schedule);
- IX. Representation of States in Parliament (Part V, Chap. II) ; and
- X. Amendment of the Constitution (article 368).

Legislation in these regards requires not only a parliamentary majority as specified above but also ratification of the Legislatures of not less than fifty per cent of Part A and Part B States. The ratification, which is obligatory, is to be through resolutions passed by a simple majority of the State Legislatures concerned. It seems to follow that as soon as the ratification of the States, as contemplated in the article, has been obtained, the Bill is presented to the President, who is perfectly competent to give his assent thereto without waiting to see what the other half of the States have or have not done.

3. Power to Amend the Constitution Belongs to "Parliament" or to "Houses of Parliament"

In the case of *Shankari Prasad v. The Union of India (1951)*, in which the Constitution (First Amendment) Act, 1951 was unsuccessfully challenged, several constitutional issues were raised by the petitioners, and have been dealt with by the Supreme Court. Of these, two issues are relevant to the subject matter of discussion in this chapter. It was contended, in the first place, that the power of amending the constitution under article 368 was conferred, not on Parliament but on the two Houses of Parliament as a designated body. Counsel for the petitioners sought to make out a difference between *Parliament* and *the Houses of Parliament*. It was argued that wherever the constitution conferred a power on Parliament, it specifically mentioned "Parliament" as the donee of the

power, as in articles 2, 3, 33, 34 and numerous other articles. The donee in article 368 was not Parliament but each House of Parliament, and therefore, it was part of the scheme, as contemplated by the framers, to confer the power of amendment on a body other than the ordinary legislature, as had been done under article V of the US Constitution.

In rejecting this view the Supreme Court point out, quite rightly, that various methods of constitutional amendment have been adopted in written constitutions, for example, by referendum as in Switzerland, by a special convention or by legislation under a special procedure as in the USA, and so on. Which of these methods the framers of the Indian Constitution have adopted must be ascertained from the relevant provisions without any leaning based on *a priori* grounds of the analogy of other constitutions in favour of one method in preference to another. It is clear that the power of effecting the first type of amendments (not treated as amendments for the purposes of article 368) is explicitly conferred on "Parliament", that is, the President and the two Houses of Parliament (article 79). There is nothing in the constitution, according to the Supreme Court, to show that it requires a body other than Parliament to effect the second type of amendments technically described as such.

The requirement of a larger majority can by itself be no reason for holding that the power has been entrusted to a different body. Having mentioned each House of Parliament and the President separately, and assigned to each its appropriate part in bringing about constitutional changes, the makers of the constitution did not think it necessary to refer to the designation of the three units taken together. Parliament is the only authority empowered by the constitution to effect constitutional amendments subject to the requirement of the prescribed majority in each House and, in the case of the second category of the constitutional amendments, to the ratification by at least one-half of the State Legislatures as well.

Secondly, counsel for the petitioners argued that, in any event, article 368 was complete in itself and did not provide

for any amendment being made in an amending Bill after it had been introduced in the House. In other words, assuming that Parliament, as distinguished from the two Houses, had power to effect constitutional changes, the Bill containing provisions for constitutional amendments must be passed without any modification or amendment whatsoever. An ordinary Bill, it was contended, could be amended in the process of legislation, but not a Bill seeking to amend the constitution. This view strenuously canvassed on behalf of the petitioners has also been rightly rejected by the Supreme Court.

Even if a constitutional amendment is not legislation and the legislative procedure prescribed for the enactment of ordinary legislation cannot in terms apply when Parliament is dealing with a Bill under article 368, there is no reason why Parliament should not adopt, on such occasions, its own normal procedure in so far as that procedure can be followed without violating the constitution. When a constitution entrusts Parliament with a power, as our constitution has entrusted our Parliament with the power not only to pass ordinary Bills but to effect constitutional changes, the framers of the constitution must be taken, in the absence of any declaration to the contrary, to have intended that Parliament is to follow the procedure which is its own and which is necessary if it is to be capable of doing its work properly and efficiently.

4. Principles of Construction

In interpreting a constitution the settled principle is that it should be construed in a broad and liberal spirit bearing in mind (i) that it is a single complex instrument in which one part may throw light on the other, and (ii) that no repugnancy or conflict was intended by its makers. The significance of the preamble to a constitution or to a statute has been explained in Chapter VII. A few words may be added here by way of elucidation of certain rules of construction. The title of a statute, according to modern practice, is an important part of the statute, and may be referred to for the purpose of ascertaining its general scope,

and throwing light on its construction. But like the preamble it cannot control the meaning of the statute where the provisions are clear and admit of no ambiguity. The function of the title, as indeed of the preamble, is to explain what is ambiguous in the enactment. A marginal note or side note forms no part of a section or article, but in cases of doubt it may prove to be of assistance in showing the drift of the section or article. But as in the case of the preamble or of the title, so in the case of the marginal or side heading, there can be no question of the clear and unambiguous language of the section or article being in any way controlled, modified or affected by it.

In the case of *Nalinakhya Bysack v. Shyam Sunder Halder* (1953) the Supreme Court have referred to section 11 of the West Bengal Premises Rent Control Act, 1948. The section provides that notwithstanding anything contained in certain Acts specified therein, "no order or decree for the recovery of possession of any premises shall be made so long as the tenant pays to the full extent the rent allowable by this Act and performs the conditions of the tenancy". The marginal note to the section simply says: "No order for ejectment ordinarily to be made if rent paid at allowable rate". In the marginal note the words "or decree" find no place at all, a fact which shows that it was not a sure guide in the matter of the interpretation of the clear and unambiguous text of the section. In observing, as they have done, that the marginal note was not prepared carefully the Supreme Court, however, seem to have overlooked the purpose or intention of the marginal heading. A heading or a marginal note is not intended so much to explain the section or article as to serve as a guide for the purposes of easy reference. It is not an integral part of the statute.

By contrast, an explanation appended to a section or article is part of the law, and is intended to control the body of the relevant text. Take, for instance, the explanation appended to article 132 of our new constitution. Reference is made in the article to the words "final order", and the explanation says that for the purposes of the article the expression "final order" includes an order deciding

an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case. A proviso to a section or article is part of the law, and where it is repugnant to the enacting part the latter is to be construed as being superseded by the proviso to the extent of the repugnancy. But when the proviso seeks to reserve or save something which would be otherwise included in the enacting part, as when a statute vests a manor in the King saving the rights of all persons, or vests in him the manor of A, saving the rights of A, the proviso is necessarily to go, because otherwise the enacting part would become useless or of no effect whatsoever. (*Yarmouth v. Simmons*, 1878). A schedule, again, is an integral part of the law, but where a paragraph in a schedule to a statute is obnoxious to a section or article, the latter, as a rule, is held to prevail. These general principles of construction may be found useful in understanding our constitution correctly or in discovering means of reconciling what, in the end, may prove apparent, but not real, contradictions in the body of the text.

Many will find it difficult to agree with the Supreme Court in the view they have taken, namely, that "the requirement of a different majority" for constitutional amendments is "merely procedural". It is, by no test or standard, a merely procedural matter. It involves the question of policy ; it provides a safeguard, rightly or wrongly, against changes of far-reaching consequences by a simple majority. Whether such a rigidity should be imported into an instrument which may call for swift and effective amendments to deal with an "unforeseen situation, or to meet the urgent requirements of progressive social legislation is a question on which different and conflicting opinions may be legitimately entertained. But irrespective of the logic or substance of this argument or that, there is no warrant for the view that "the requirement of a different majority is merely procedural".

In fairness to the petitioners and their counsel in the case of *Nalinakhya Bysack v Shyam Sunder Halder* it should

be pointed out, however, that they attacked a constitutional amendment passed by the Provisional Parliament which was not then Composed of two Houses. This fact is mentioned here, because otherwise the distinction sought to be drawn on behalf of the petitioners between "Parliament" and the "two Houses of Parliament" may, in the present context, sound absurd. But there is no qualitative change in the essence of the Supreme Court's ruling. It is still good law. Thus our constitution has elements of both flexibility and rigidity. It is flexible because, certain alterations may be made by simple parliamentary legislation enacted in the ordinary simple manner. It is rigid because other alterations, technically called amendments, call for an extra-ordinary process of parliamentary legislation and, in certain cases, ratification by the legislatures of a specified proportion of Part A and Part B States.

5. The USA Procedure as to Constitutional Amendments

The process of constitutional amendment of the USA Federal Constitution is described in article V of that constitution. There are two ways" of proposing amendments. The first is that Congress shall, if necessary, propose amendments by a two-thirds vote of the House of Representatives and of the Senate, and not by a simple majority. The second is that a convention, called by the Congress on the application of the legislatures of two-thirds of the several States, may propose amendments. Ratification may also be done in two ways; (i) approval by the legislatures of three-fourths of the States, or (ii) approval by conventions in the same number of the States.

Whether the one or the other method of ratification is to be used is determined by the Congress. The usual practice, however, is to resort to the Congress for proposing amendments, and to the State legislatures for ratification. The convention method is not either popular or is not encouraged by the ruling class or classes. Ratification by conventions, and not, by the legislatures, was used only in the case of the Twenty-first Amendment,

whereby the Eighteenth Amendment has been repealed and the transportation or importation of intoxicating liquors for use or delivery in any State, Territory or Possession of the USA is prohibited. It, seems that the requirement of a two-thirds vote in the House and in the Senate does not mean a two-thirds vote of the total membership of each Chamber. It means a two-thirds vote of the members of each House present and voting. In no circumstances can a State be deprived of its equal representation in the Senate without its consent.

The President does not come into the picture in connection with constitutional amendments. He cannot veto them. Amendments are valid, and become part of the constitution as soon as the requirements of article V are fulfilled. In that article there is no mention of the President. The time limit for ratification, as contemplated in the amendments made since 1919, is seven years, and, by contrast, we have no such provision for time limit in our constitution. That question, however, does not arise in our country except in the case of those amendments which require ratification by the States.

6. The USSR Procedure

The procedure for amending the USSR Constitution, as distinguished from the constitutions of the Republics, is prescribed in article 146, and is simpler than our own, and much more simple than what is in vogue in the USA. The constitution may be amended only by decision of the Supreme Soviet of the USSR adopted by a majority of not less than two-thirds of the votes cast in each of its Chambers. Provided there is a quorum in each Chamber, a constitutional amendment may be effected by the votes of a comparatively small proportion of the members. There is no insistence on a majority, far less a prescribed majority as in our case, of the total membership of each Chamber of the Supreme Soviet for the purposes of constitutional amendment. The reference is to the votes cast in each Chamber. The territory of a Union Republic cannot, however, be altered without its consent.

In Britain, as has already been explained elsewhere, Parliament by a simple majority may enact any law it likes. No difference is made in this respect between what are called constitutional amendments and ordinary legislation. Both are passed and enacted into law in the same way. Nor can courts go into the constitutionality or otherwise of any parliamentary statute.

7. The Judicial Review in USA

This brings us to the question of interpretation of the constitutions or other constitutional questions by courts, and I to a brief comparative study of the systems prevalent in certain important countries. In the USA, as we have seen, by judicial review the Supreme Court enlarges or restricts, as the case may be, the scope of the constitution. As an American Supreme Court Chief Justice has remarked, the Court "is the final interpreter of the Acts of Congress", and a statute means what the Court says it means. This principle applies to the interpretation of statutes as well as to constitutional amendments.

In recent years, however, the Supreme Court has adopted certain rules in order to avoid, as far as possible, intervention in policy decisions. First, it proceeds on the presumption that the impugned legislation is constitutional unless it is satisfactorily rebutted by those who challenge it. Second, if there is any doubt on any point, the benefit of the doubt rule shall apply. That means that the impugned legislation stands. Third, where it is possible to avoid the question of constitutionality of an issue without prejudice to the cause of justice, it shall be avoided. Fourth, if an invalid part or section of a statute can be separated from the other 'parts or sections which are' not open to challenge, then the latter remain whereas the invalid part or section only goes. Fifth, no decision is given on political questions which are left to the judgment or discretion of what are called the political branches of the State, that is, the legislature and the executive.

These are rules of interpretation which are, more or less, observed in English and Indian courts. An American

author calls them "self-limiting" rules. These are not statutes, and mayor may not be respected by the court. Even if they were statutes, they could, be nullified by judicial review. The broad fact remains nevertheless that the USA Supreme Court can exercise its power in such a planner that this exercise of power may, directly or indirectly, lead, on occasion, to far-reaching constitutional amendments unless, of course, the ruling class or classes working from behind pull the strings and put the court in its proper place.

8. Peculiar Features of Different Systems

Our Supreme Court is designed to follow the middle path—neither absolutely British nor wholly American. Like its American counterpart it may adjudicate on the constitutionality or otherwise of laws passed by the legislatures, Union or State, but like the British courts, again, it cannot act as a super-legislative chamber, annulling statutes by reason of their repugnancy to those vague and flexible principles of natural justice. Our Supreme Court is the final interpreter of the constitution all right, but it has no power of judicial review. It has nothing to do with policy decisions.

Provisions as to the interpretation of laws, including the organic and fundamental law; in the USSR, rest on foundations entirely different from those of capitalist systems. No courts, not even the Supreme Court of the USSR, can interpret the laws in the sense laws are interpreted by our courts. The Presidium of the Supreme Soviet, which is accountable to the latter, interprets the laws, issues decrees and annuls decisions and orders of the Union and Republic Ministers in case they do not conform to law (article 49). By this process the makers of the USSR Constitution have, sought to eliminate conflict between statutes as originally, framed and their interpretations by courts of law. Interpretations by judges cannot create new rules or supersede the statutes. The Presidium not only interprets the laws but determines the method of interpretation, and the Presidium is, not a court of law.

One feature of our judicial system as also of the American and British systems is that, except in special

cases, the, courts do not and cannot, on their own initiative, take cognizance of violations or breaches of constitutional laws or of other statutes. Take one or two instances. A perfectly eligible person is not included in the voters' list, and consequently he can neither stand for election nor vote at the election. Can an election tribunal in our country take cognizance of the matter and ensure that the person concerned is not deprived of his right ? No, it cannot, unless it is seized of the matter by a petition, application, complaint, or some other process. Again, a policeman runs amock and assaults an innocent citizen in violation of the law of the land and in disregard of the duty cast upon him. He commits an offence. Does a court bring the policeman before itself and punish him and thus vindicate the law ? No, it does not, as a rule, unless some process is set in motion to bring the matter to its notice. So the interpretation or adjudication is not in our country a systematic function of the courts or tribunals. Like the *Sankhya Purusha* they are in a state of profound coma. Even as the *Purusha* is stirred to 'life' by the call of *Prakriti*, or of an external agency, so also are our courts and tribunals roused to action by plaint, petition and prayer.

9. No Dualism in the Soviet Way

That is not the Soviet way. In the USSR they do not believe in dualism. The constitution and the law are made by the people and nobody knows their aims, objects and purposes better than the makers themselves. So it is not the courts that are entrusted with the task of interpreting the laws, and in the process of interpretation, of crossing the bounds of the laws and interposing their own decisions, good, bad or indifferent. The interpretation is left to the Presidium; and if the Presidium exceeds its powers in the regard, the Supreme Soviet intervenes and calls it to account. And the interpretation is a systematic function of the Presidium in that, of its own motion, and on its own initiative, it takes up any matter in which violations or breaches of the law are involved, and then provides a corrective. It is continuously in action. No petition

is required to bring into full play its power to interpret or annul a law.

In the earlier stages of the Bolshevik Revolution they had created a Supreme Court and given it power to elucidate questions of all-Union legislation, and to interpret the constitution upon request by the Central Executive Committee of the USSR. That was under the constitution of 1924. All this has changed under the Stalin Constitution of 1936. These issues have been introduced in connection with the procedure of constitutional amendments, because under a written constitution the decisions of courts in our country, though not to the same extent as in the USA, may in certain cases or on certain occasions take the form of constitutional amendments.

Some people believe that there is something sacred or sacrosanct about a written constitutional document which should not and must not be disturbed by the legislature. There is, without doubt, a substantial difference between a constitutional charter and an ordinary statute, and both must not be dealt with in the same manner. But there is no permanence in a constitution, as Prime Minister Nehru said when the draft of our constitution was being debated in the Constituent Assembly. Where the constitution, as in the USSR, is "the registration and legislative embodiment of what has already been achieved and won in actual fact", it calls for amendment when it becomes out of date in view of new achievements, of new social conquests. The USSR Constitution reflects the fact that socialism has been achieved. But if and when the higher phase of communism is reached, the constitution must be amended by way of registering and recording that new achievement. Where, however, a constitution, as in our country, is in the main a programme to be pursued, there is prattle about the sanctity of constitutional provisions.

10. The Rigidity or Flexibility of a Constitution not its Real Test

In a world of swift changes, what we may do today may not be applicable tomorrow. A people can ill afford

to stop or hinder their growth and development by a constitutional inflexibility which takes no account of the elemental social urges. In the leisurely western stability of the nineteenth century it suited scholars, thinkers and makers of constitutions to indulge the luxury of theory without practice, heavenly bliss without earthly basis, the chromosome invariability free from man's contamination and so on; but in the present century of turmoil and conflict, of lurking dangers as well as of immense possibilities, we must be constantly on the move. A constitution becomes a mere piece of parchment paper if it fails to take account of these hard realities of a complex life.

The test of a constitution does not lie in its rigidity or flexibility; it lies in the nature, character and magnitude of the achievement it records and in the policy and programme it envisages and, what is more important, in the source of its authority and sanction. A constitution, rigid or flexible, in the hands of exploiting classes may be used, as is frequently the case, for purposes other than the welfare of the broad masses. On the other hand, a constitution, rigid or flexible, under the control of the toiling masses, serves as an instrument of social progress even if it is not a record of what has already been achieved in fact. In either case, however, the ruling classes do not hesitate to amend the constitution to promote their class interest, no matter whether in theory or in form the constitution is rigid or flexible. The controversy about the rigidity or flexibility of a constitution and the relative merits or demerits of both is, in our time, more of academic interest than of practical importance. It may provoke jejune lucubrations from scholars or learned *obiter* from courts but makes little or no change in the stark reality of a given situation. In this perspective, and in no other, should the procedures relating to the amendments of constitutions be investigated and analysed. Then alone can the inner essence of constitutions, of substantive and procedural laws, and of judicial interpretations and reviews be properly and adequately assessed.

INDEX

- Act of 1679 : *habeas corpus* measure, 74.
- Act of 1815:extension of *habeas corpus*, 74.
- Act of 1838 : sets up Judicial Committee of Privy Council, 491.
- Acts of Indemnity, 73.
- Act of Settlement : part of English constitutional law, 35 ; assures security of judges, 187.
- Adams, John: drafts fundamental rights, 70.
- Afganistan: Bachha Sakko's rule in, 270.
- Aga Khan deputation : 221, 313.
- Agamemnon* : as mentioned in *Iliad*, 3.
- Agora*: Greek term for "Council", 3.
- Agricultural Holdings Act, 1923: 520.
- Air Force Act : part of British military law, 83.
- Ajmere-Merwara : part C State, 289-90.
- Act : question of validity of, 171-2.
- A. K. Gopalan v. the State of Madras*: Supreme Court ruling in, 99.
- Alaska : naturalization in USA of inhabitants of, 57; territorial representation in US of, 292-3.
- Allahabad High Court : a court of record, 490.
- Ambedkar, Dr : on the character of the Union of India, 305-6 ; view criticized, 307; on our judicial system, 515.
- America : eligibility to be President or Vice-president of, 56; distinction between nationals and citizens in, 60; monarchical absolutism overthrown, 276.
- Americans . aliens in India, 61
- American Constitution : guarantees freedom of speech and press, 94, 205; assures liberty, 207, ideas borrowed in India from, 291; provision regarding change in territories, 300, referred to on taxation issue, 457-8.
- First Amendment : on freedom of speech and expression, 94, 205; Fifth Amendment . guarantees life, liberty and property, 100; guarantee of property, 104.
- Eleventh Amendment : provision of, 516.
- Fourteenth Amendment : bearing on citizenship of USA, 50, influence on Indian Constitution, 87, contributes to powers of Supreme Court, 183.
- American Federation of Labour : 423.
- American Government : makes declaration of fundamental rights, 70; founders influenced by Locke and Montesquieu, 175.
- American Revolution of 1776 : change of States involved in, 29.
- American Samoa : US territory, 292
- American War of Independence : declaration of July 4th, 1776 : 256.
- Anatole France : on equality, 93
- Andaman and Nicobar Islands : part D territory, 290-1; Calcutta High Court jurisdiction extended to, 512.
- Andhra : part A State, 290, proposed province of, 302
- Aney, M S : member of Linlithgow Government, 229.
- Anglo-Indian community : no seats reserved for, 470

- Anson : *Law and Custom of the Constitution*, 361.
- Arizona : a US State, 292.
- Aristotle : on citizenship, 46.
- Army Act : part of British military law, 83.
- Aryans and non-Aryans: ancient Indian society divided into, 43.
- Asoka : experiment of, 216
- Assam : 219, 231; Part A State, 290; Sylhet, a part of: 237; grant-in-aid to, 450, 452; share of income-tax, 451; representation of tribes of, 469.
- Alteration of Boundary Act, 1951: 290.
- Assizes : crimes tried in, 156.
- Aswini Kumar Ghose v. Arabinda Bose* : Supreme Court decision in, 111, 490, 496.
- Attorney-General v. De Keyser's Royal Hotel*, 159.
- Attorney-General for the Commonwealth v. Colonial Sugar Refinery Company Ltd.*, 306.
- Athens : citizens and subjects in, 43.
- Attlee, Mr. : Prime Minister, announces Cabinet Mission to India, 231; announces a date-line regarding political settlement, 233.
- Government's plan accepted, 238.
- Austin : on the doctrine of sovereignty, 272; views examined, 273-4.
- Australia, Commonwealth of: federal units called States, 34, a Commonwealth country, 62; Parliament of: power to readjust States, 301.
- Commonwealth of Australia Act, 1900: 315; analogy in USSR Constitution, 324.
- High Court: no reference jurisdiction, 509.
- Australians : not fully aliens in India, 61.
- Bachha Sakko : rule of, 270.
- Baldwin, Mr. : appointed prime Minister : 359.
- Balfour formula of Commonwealth membership, 259.
- Balzac v. People of Puerto Rico*: 292.
- Baluchistan : Muslim-majority province, 222, on plebiscite in, 236.
- Bankura : district of, 394.
- Bank of International Development and Reconstruction: loans from, 268
- Basileus* : Greek term for military chieftain, 3
- Bastille : storming of, 72.
- Beard, professor : on the composition of the Philadelphia Convention, 71.
- Bengal : 219; Muslim-majority province, 221, 231, Presidency of, 312
- Bentham : develops the concept of sovereignty, 272.
- Bharat : A Union of States, 32, 288
- Bhim Sen v. the State of Punjab*, 179.
- Bhisma : on origin of the State. 5. 191, 194
- Bhopal : Part B State, 290;
- Bihar : 219-20; Part A State, 290; composition of State legislature, 428. grant-in-aid to, 450; share of income-tax, 451.
- Bilaspur : Part C State, 290
- Birbhum : district of, 394.
- Bill of Attainder : meaning of, 76-7
- Bill of Rights : whom it benefits, 69; provision of, 70; not part of American Constitution, 72.
- Blackburn : on terms of Crown servants, 405.
- Blackstone : defines separation of powers : 163
- Bluntschli : on the State, 13; general welfare theory of, 211

- Bolshevik Revolution : procedure relating to interpretation of laws in earlier stages of, 543.
- Bombay, island of : ceded to English King and transferred to East India Company, 217; Presidency of 219-20; Part A State, 290, 312; composition of State legislature, 428; share of income-tax, 451; part of 488.
- High Court, separate jurisdiction, in 489; a court of record, 490; original civil jurisdiction of, 496; power to issue high prerogative writs, 506; original civil and criminal jurisdiction of, 510.
- Bose J, dissenting view of : 90.
- Bowles, Mr. Chester. signs Technical Cooperation Agreement with India, 266.
- Brainard International Co : signs agreement with Government of India, 268.
- Bradlaugh v Gosset* : ruling in, 463, 465
- Brijbhusan v. the State of Delhi*, 95
- Britain : nature of property in, 21; distinction between military law and martial law in, 83; freedom of speech and expression in, 94, women's right to vote recently conceded in, 127, party government in, 134; extensive jurisdiction of ordinary courts in, 155, criminal liability of a member of the armed forces in, 156; "Act of State" in 159; 160, supports Pakistan over Kashmir, 248, monarchical absolutism overthrown in, 276; agreement with Ireland. 1921, 297; parliamentary procedure in, 439; monarch's prerogative writs, 507.
- British Nationality Act, 1948 : provisions of, 62; Commonwealth citizenship defined in, 63; 257
- British North America Act, 1867 : Privy Council reference to, 174; a British statute, 315.
- British Parliament : not created by constitution, 462
- Britons : not fully aliens in India, 61.
- Bryce : on how union was maintained in USA, 310
- Burdwan : obtained by the Company, 218; district of, 394.
- Burke, Edmund : gives definition of party, 129.
- Burma : 219-20.
- Independence Act, 1947: 256.
- Burgess : on the State, 14.
- Butler, Mr R. A. : announces dismissals on security grounds, 423
- Cabinet Mission : proposals of, 231.
- Calcutta : people died of famine in, 199; Company obtained right over, 218; capital of India removed from, 219; administrative mechanism of, 395, part of, 488.
- High court : ruling on the Governor being subject to advice of his Ministers, 276-7, view criticized, 277-8; ruling on Ministers not being officers, 285-6; overruled by Privy Council, 386-8; view examined, 388-391; separate jurisdiction maintained in, 489, a court of record, 490; original civil jurisdiction of, 496, power to issue high prerogative writs, 506; original civil and criminal jurisdiction of, 510; jurisdiction extended to Andaman and Nicobar Islands, 512.
- Calhoun : view on sovereignty, 282
- Cantonments Act : question of validity of, 499
- Canada : a Commonwealth country, 62, a multi-national State, 129, nature of State of, 306, federation

- initiated in, 315; provision regarding language, 337.
- Canadian Temperance Act of 1878: held valid, 174.
- Supreme Court Act of 1906: no reference jurisdiction, 509
- Canadians not fully aliens, 67.
- Carr, Thomas : on "Henry VIII Clause," 169.
- Central Commission for Reorganization of States : scope of, 302-4.
- Central Provinces and Berar : renamed "Madhya Pradesh," 290.
- Central Criminal Court : crimes tried in, 153.
- Ceylon : a Commonwealth country, 62.
- Chandernagore, French : 291.
- Chota Nagpur : 219
- Charles I signs Petition of Right, 69.
- Chartists : pressure organized by, 74.
- Charter of 1753 : sets up Mayor's Court, 490.
- China : Peoples' Republic of or New: departure from the traditional laws of marriage in, 18; change wrought in the character of her State, 29, recognized by some States and not recognized by others, 29-30; democratic pattern of, 35, increasing predominance of the State in, 197; "democratic dictatorship" in, 202-3; Government of, 270, sovereignty not unquestioned 271
- Chinese : aliens in India 61.
- Chatterjee, N C. : was a judge of Calcutta High Court, 495
- Chamberlain : 214
- Chiang Kai-Shek : overthrow of, 29, recognized by USA, 30, recognition continues of, 210.
- Chequers Estate Act, 1917 reference to office of Prime Minister, 360.
- Chisolm v. Georgia*, 281, issue explained, 516.
- Churanjib Lal v. the Union of India*, 87
- Chittagong : obtained by Company, 218
- Churchill : acknowledges role of Soviet Union, 126; policy towards India, 227, 234, 238-9, 248.
- Churchill, Lord Randolph : retirement of, 360.
- Civil War of 1867- in USA, 284.
- Civil Service Commission of US : 419-20.
- Classification Act of 1923 : of US, 420.
- Clive : Twenty-four Parganas assigned to, 218.
- Cocanada. Congress session at, 221.
- Coke's dictum : 145.
- Cooley : authority on right to private property : 103, 106-7.
- Collins, Michael : forms Provisional Government, 297.
- Commons : an estate of the realm, 130.
- Committee on Ministers' Powers : 181; recommendations of, 182.
- Commonwealth : countries named; 62; citizens are British subjects, 62-3; India's position adjusted to, 64-6; India and Pakistan lean to, 257; India cannot make war against a member of, 287 —Prime Ministers' Conference, 257
- Commons Order of 1641 : regarding parliamentary privilege, 460.
- Communist Party of India : 134.
- Communist Party of the Soviet Union : complete democracy exists in, 143.
- Company, East India : rule extended, 217-8.
- Cooch Behar : district of, 394.
- Coorg : Part C State, 289-90.
- Convention: at Philadelphia 71-2

- Congress : major Indian party, 134,
—League Agreement, 222,
short-comings of, 223-4,
transfer of power to, 226, rejects
Cripps Scheme, 228-9; attitude
to Wavell Plan, 231; accepts
Attlee Government's Plan, 238;
post-independence emphasis on
the Centre, 285; rejected Federal
Scheme of 1935 Act, 314
—Working Committee or High
Command : release of members
of, 231; begins to reconcile
itself to partition of the country,
234; accepts partition, 235
- Congress of Industrial
Organizations in USA : 423.
- Conservatives, British : on the
western democratic approach,
24, come to power, 31; modern
English party, 131; class
character of, 136.
- Constables Protection Act : advan-
tageous for public servants, 160.
- Constituent Assembly, Indian
based on restricted franchise, 43;
Congress demand for, 223,
Cabinet Mission regarding, 232,
Muslim League dissociation
from, 233, amends Government
of India Act, 246, origin of, 249;
policy regarding allocation of
power, 286; reason for
alternatively calling India
'Bharat,' 288; wisely retains the
name 'India,' 289; decides
differently from Ireland, 298;
fails to provide for readjustment
of States, 301-2; prefers a strong
Centre, 339; draws from
Government of India Act, 1935,
368; enactment regarding
Supreme Court, 492.
—Pakistani : based on
restricted franchise, 43
- Constitution (First Amendment) Act :
unsuccessfully challenged, 533
- Connecticut : a US State, 292.
- Council of State, French : function
of, 153-4.
- Conseil d'Etat* : meaning "Council
of State," 153.
- Council of States : composition and
functioning of, 430; controversy
with House of the people, 435.
- Crown Proceedings Act, 1947;
removes immunity of the Crown
and its servants, 157-8;
provisions of : 404, 412.
- Cripps Mission : 227-9.
- Cripps Scheme : Churchill's policy
laid down in, 234.
- Curzon, Lord : religious conflict in
India initiated by, 222. not
commissioned to be Prime
Minister, 359.
- Customs Consolidation Act : advan-
tage for public servants, 160.
- Cutch : Part C State, 290.
- Dail Eireann : powers of, 253;
attitude to agreement between
England and Ireland in 1921
297, nominates the Prime
Minister of Ireland, 369.
- Dar Committee : opposed creation
of merely linguistic States, 303
- Darjeeling : district of, 394; district
magistrate called deputy
commissoner, 396.
- Darsan Singh v. the State of
Punjab* 504.
- Das, Dr. Tarak Nath : not a citizen
of India, 53
- Das, P. R. : was a judge of Patna
High Court, 495.
- Declaration of Independence by US
Congress 71.
- Declaration of Rights of man and
citizen adopted by French
National Assembly, 72, expan-
ded, 73 : a source of constitution
in capitalist States. 78.
- Delhi : Capital of India removed to,
219 : Part C State, 289-90

- Delhi Laws Act, 1912 : question of validity of, 171-2
- Delaware : US State, 292.
- Democrats : American, 24, replaced in power by Republicans, 31; emergence of, 133; class character of, 136
- Denning, Sir Alfred : on difference between English and Soviet ways of life 122-3; on totalitarianism, 126; compares English law with French, 185-6; on independence of judges, 186-7
- Dhirendranath Sen and another v. King-Emperor* : Calcutta High Court decision in, 385.
- Dicey : author of *Rule of Law*, 87; no equality before the law, 87-8; on the rule of law, 147-9; contradicted, 150, view examined, 151-2; on sovereignty, 275-6, 282; on nature of US State. 306; on nature of a State, 308-9, on what is a federal State, 326-330.
- D N Banerjee v. P. R. Mukherjee* : Supreme Court decision in, 426.
- DORA : war time law in Britain, 85, 159
- Droit Administratif* : a French system, 153.
- Dred Scott Case, the. 147
- Dunne, Sir Lawrence. releases Eisler, 98-99
- East Bengal : 239, conflict with Karachi, 284; struggle for Bengali language, 340.
- East India Company : establishment of sovereignty of, 217-8; succeeded by British Crown, 251; legal authority of, 269; position of Courts under, 488
- East Punjab renamed Punjab, 290.
- Eastern Europe : departure from the traditional laws of marriage in, 18; democratic pattern of, 35; increasing State dominance 197; in democratic dictatorship in, 202.
- EDC . 317.
- Eire : Republic of Ireland formerly known as, 63; Constitution of, 78.
- Eisenhower, President : announces military aid to Pakistan, 264, letter to Nehru, 265.
- Eisler, Gerhardt : set free, 98-9.
- Election Commission . conduct of elections vested in, 179; power to adjudge elections, 472.
—v *Venkata Rao*: Supreme Court ruling in, 474, 505, 507.
- Elizabeth Queen . refers to 'British Commonwealth,' 260.
- Eminent Domain* : principles explained, 103, adopted in USA, 105; what it does not imply, 106; what it implies, 106-8.
- Engels : classification of epochs by, 1; on class divisions in Greece and Rome, 69; on equal obligations of individuals, 127
- England : subjects and citizens in, 51, constitutional developments in, 73; place of private ownership in, 123; judicial independence in, 186; Industrial Revolution in, 195.
- European Continent or Europe . question of martial law in, 85; *droit administratif* in, 153, Industrial Revolution in, 195.
- Faizpur Congress at, 223
- Fakr-uddin . heir-apparent to the Moughul title, 217.
- Fazl Ali, Mr . on the USA president and Cabinet have no legislative role, 167.
—Member-Chairman, States Reorganization Commission, 302-4
- Federal Court of India : appeal against order of, 405, jurisdiction of, 491, admits legal right, 499; had original jurisdiction in inter-provincial disputes, 501; the kind

- of jurisdiction barred without certificate from High Court, 502.
- Florida : naturalization in USA of inhabitants of 57.
- Foff v. Wood* : decision on citizenship in 58.
- Formosa : Chinese regime at, 29.
- Fourteenth Army: operation of, 199.
- France : events in, 72; constitutional developments in, 73; question of martial law, 85; women's right to vote recently conceded, 127; *droit administratif* in, 153; treaty with, 217, monarchical absolutism overthrown in, 276, President of, 354
- French National Assembly : adopts declaration of rights of man and citizen, 72.
- French Administrative Tribunals . 155.
- Franco: Government of . recognized by US and others, 271
- Frazier-Lemke Farm Mortgage Act, 1934; declared invalid, 486.
- Gandhiji . legal status under Independence Act of, 44; noble ideals of, 99; on Ram Rajya, 190; attitude to Communal Award, 222; principles examined, 224-6; terms to Jinnah, 230, invited to Simla Conference, 231.
- Garner, Professor author of 'Political Science and Government', 211; view examined, 212.
- Georgia : a US State, 292; sued by citizens of South Carolina, 516
- Germany : defeated, 230.
- Ghulam Mohammad: Governor-General of Pakistan, 371
- Gobindapur : Company obtains rights over, 218.
- Gokhale . approved separate Muslim representation, 222
- Gordon v the United States*, 147.
- Government of India Act, 1909 : introduces separate electorates, 221.
- Government of India Act, 1919:219; devolution of powers under, 311.
- Government of India Act, 1935; franchise prescribed in, 43, 234; section 299 reproduced in constitution, 102; territories redistributed under, 220; the MacDonald Award, 221; amended in respect of Princes, 245; replaced, 250, federal principle recognized in, 313-4, 338; Constituent Assembly draws from, 368; interpretation put in 1935 still valid, 369; Calcutta High Court ruling on certain provisions of, 386-7; Provision regarding dismissal of Public servants, 405-8, ordinance under, 447; provision for restrictions on financial autonomy, 453, sets up Federal Court of India, 491; on 'legal right,' 500; provision for special appeal to Federal Court, 503; provision for reference jurisdiction of Court, 508
- Greece : class division in, 12.
- Creek City-State : slaves had no place in, 46; organization in, 130
- Guam: US territory, 292.
- Habeas Corpus* Act of 1679: contributes to fundamental rights, 70; suspended, 73
- Haldane: on British North America Act of 1867, 306, view repelled, 318.
- Harlowe v Hansard* . ruling in, 461
- Hawaii: US territory, 292; representation of, 293.
- Hegel doctrine of, 8; opposition to Kant, 9, on the State, 14; morality theory of, 211.
- "Henry VIII Clause": provision for extraneous powers, 169.
- Hewart, Lord: on 'equality before the law', 87-8, extols principles of English law, 149, view contradicted, 150.

- Himachal Pradesh : Part C State: 290.
- Hitler: peace overture to, 314.
- Hindusthan Standard* : proceedings against article in, 385
- History of English law : by Holdsworth, 507.
- Hindi : official language of Indian Union, 337.
- Hobbes : exponent of the Contract theory, 6.
- Homer : author of *Iliad*, 3.
- Holy *Quoran* : division of people described in, 43; nature of State delineated in, 195.
- Holland : *Jurisprudence* on "legal right," 499.
- Hooghly : Company settlement at, 218, district of, 394
- Holdsworth William : on division of powers, 164; legal interpretations, 507.
- Holtzendorff : general welfare theory of, 211.
- Hodge v. the Queen* : Privy Council decision in, 174.
- House of Commons : right to impeach persons : 166; privileges of, 462-6.
- House of the People : composition of, 430-1, controversy with Council of States, 435.
- House of Lords : not a useful body, 474-5.
- Houghton and others v. Plimsoll* : ruling in, 461.
- Howrah : district of, 394
- Hurlander v. California* : US Supreme Court decision in, 527.
- Hyderabad: refuses to accede to India and then accedes, 247-8, Part B State, 289-90
- Iliad* : by Homer, 3.
- India : recognizes People's China, 29; Republic of, 30; Union of States: 32, 305; has recognised the Head of the Commonwealth 35; was an independent dominion, 44; law of citizenship in, 52-5; whether Kashmir is a part of, 52; migrants from Pakistan into, 53-5; Naturalization Act in, 56; loose use of the term 'Nationals' in, 60; a Commonwealth country, 62, not a foreign country in relation to U K., 63; adjustment as a Republic to membership of the Commonwealth, 64-5; 258-9, British bureaucratic tradition in tact in, 114; a multinational State, 129, parties in, 134; prospects of parliamentary government in, 134-5; dominion of, 239; succeeded to membership of international organisations, 241; right to declare war, 254; war with Pakistan not feasible, 255, leans to Commonwealth, 257; cannot make war against a member of the Commonwealth, 287, advantage gained by retaining name, 289; difference from Ireland, 297-8; one-nation idea in, 340, no-'nation' in, 341; office of Prime Minister recognized in law, 360, collective responsibility in, 361, functioning of Government of, 366-9; British convention in, 370, President of, 371.
- (Consequential Provision) Act, 1949: prescribes operation of British law in relation to India: 64, 257.
- Indian Army Act of 1911: part of military law, 80
- Indian Air Force Act of 1932: part of military law, 83.
- Indian Navy (Discipline) Act of 1934: part of military law, 83
- Indian Civil Service : replaced by Indian Administrative Service, 395, guarantees to, 402.
- Indian Administrative Service replaces Indian Civil Service 395

- Indian Police Service . guarantees to, 402.
- Indian Christians : no seats reserved for, 470.
- Indian High Courts Act, 1861 : creates High Courts, 489, 506.
- Indian Penal Code : law of citizenship in, 33
- Indian Union . citizens of, 51. whether it is a federal State, 332 law-making authority in, 428; secular character of, 469.
- Indian Dominion . States accede to 247-8.
- Indian States : Cabinet Mission proposals regarding, 231-2.
- Indian Republic: sovereignty in, 277-8.
- Indian Independence Act, the : 44, 239; compared with the Statute of Westminster, 241-4 replaced by Constitution, 250; gives right to secede from Commonwealth, 251; provision regarding membership of international organization, 289; limitation of power of Governor-General, 372
- Indian Independence (International) Arrangements Order, 1947: 241
- Indian Constitution: emphasis on Centre in, 284, imposes one-nation idea, 340-2
- Inland Revenue Act: Advantage to public servants, 160.
- Indemnity Acts: in Britain, 85, 159
- Industrial Disputes Act. 426-7.
- Ireland, Republic of: not a foreign country in relation to Commonwealth, 63, 253; neutral in Second World War, 253; right to declare war 254; story of partition of, 294-5; agreement with Britain, 1921, 297, office of Prime Minister recognized in law, 360; collective responsibility in, 361.
- Irish Free State. kept aloof from Second World War, 242.
- Irish Executive Authority (External Relations) Act, 1936: partially eliminates Crown, 242, 261.
- Irish Constitution Act, 1936 Governor-General becomes Head of the State, 252; British connection not severed by, 261; rejects two-nation theory, 296, certain positive provisions, 369
- Israel : hurried recognition by US Government, 271.
- Jacobian Constitution of 1793 : expansion of earlier Declaration, 73.
- Jalpaiguri : district of, 394; district magistrate called deputy commissioner, 396
- James II : deposition of, 69
- Jammu and Kashmir : State citizenship in, 52; Part B State 290, limited power of Parliament regarding, 448
- Jellinek : view on sovereignty, 282.
- Jennings lectures before University of Madras, 93; on fundamental rights during an emergency, 113; view examined, 113-4; contradicts Dicey and Hewart, 150; on Dicey, 162.
- Jesus Christ demarcates Church from State, 195
- Jinnah : Muslim self-determination theory of, 229; Gandhijis' terms to, 230; invited to Simla Conference, 231; wins his point, 238.
- Johnstone v. Pedlar* 160
- Jones v. Randall* : decision in, 463.
- Johnson, President impeachment of, 364.
- John, King. grants Magna Carta, 69.
- Judicial Committee Act, 1833 508.
- Judicature Act, 1873: relating to British judiciary, 519
- "Justice and Administrative Act" by Robson: 181
- Judges Bill; 517.

- Kant on the categorical imperative, 8, opposed by Hegel, 9
- Karachi. Congress session at, 223; conflict with East Bengal, 284.
- Karnatak: proposed province of, 302.
- Kashmir: story of refusal to accede and accession of, 247
- Kashmiris: dual citizenship of, 52.
- Kashimbazar Company settlement at 218.
- Kathi Raning Rawat v. the State of Saurashtra* 87, 89-90
- Keith Professor A. B.: on unsuitability of democracy for Indian society, 216-7; on establishment of British sovereignty, 218.
- Kedarnath Bajoria v. the State of West Bengal*: 87, 89-91.
- Kerala. proposed province of, 302.
- King v Halliday ex parte Zadig*: Lords decision in, 73.
- King v. Graham*: ruling in, 462
- King-Emperor v. Sadasiv Narayan Valerao*. Privy Council decision in, 96.
- King-Emperor v. Hemendra Prosad Ghose and another*: Calcutta High Court ruling in, 385-6.
- King-Emperor v. Sibnath Banerjee*. Privy Council ruling in, 386.
- K. L. Gauba v. the Chief Justice and Judges of the High Court at Lahore*. 502
- Krishna Dvaipayana Vyasa: the sage of sages, 68.
- Krishna-Vasudeva era: prevalence of merit in, 68
- Kurma Purana. on the ushering of a new State, 28.
- Kuomingtung driven from the mainland of China, 270
- Kunzru, Pandit Hridaynath: member, States Reorganization Commission, 302
- Labour-Government 31; modern English party, 131, class character of, 136; comes to power, 231.
- Labour Appellate Tribunal: ruling doubted, 427.
- Laband: view on sovereignty, 282.
- Lahore High Court: Federal Court varies decree of, 405.
- Lal, I. S.: case of, 405-7
- Legislative Assembly of a State: composition and functioning of, 431-2.
- Legislative Council of a State: Composition and functioning of, 432-3.
- Lenin : on the character of the Soviet State, 38-9.
- Liberals—British: on the western democratic approach, 24; modern English party, 131; class character of, 136.
- Lincoln, Abraham: on democracy, 203; for "indestructible union", 284, 310.
- Linlithgow: Government of, 229.
- Liquor License Act of 1877: reference to, 174.
- Lloyd George, Government of: not affected by Montagu's resignation, 360.
- Locke: on the State of nature: 6; theory of, 7; on the limit of the sovereign power, 7, disquisition of, 70; on delegation of powers, 163; influence on American Government, 175
- London: City of: controller of property, 22.
- Lords Spiritual: an estate of the realm, 130.
- Lords Temporal: an estate of the realm, 130.
- Lords House of: decision in the *King v Halliday ex parte Zadig*, 73; ruling in *Re Clifford and O' Sullivan*, 84; power to impeach before, 166, highest court of appeal, 462; a court of

- record, 492; no advisory opinion, 508.
- Louisville Joint Stock Land Bank v. Badford* : decision in, 486.
- Low, Sir S. : illustration by, 361
- Lysenko : shakes old conception in genetics, 105.
- Mao : on knowledge, 14; leader of People's China, 29, not recognised by USA, 30, on history of society, 191; explains "democratic dictatorship", 202; on the two political blocs existing, 257; Government of, 270
- Mahabharata* : reference to Shanti Parva, 5; 190, pattern of values in, 216.
- Maine : on the basis of law, 16.
- Magna Carta : secured, 69; provisions of, 69-70, dictum laid down in, 144.
- Maitland : on the basis of the British Constitution in real property, 21.
- Marx, Karl : on sense of good and evil, 4; on social and psychological factors, 10-11, on the basis of law, 17, on ultimate Statelessness of the world, 25, on class division in Greece and Rome, 69, on the determinant of consciousness, 486.
- Marxian interpretation of history, 5.
- Maharashtra : proposed province of, 302.
- MacDonald Award. 221
- MacDonald : Government of, 360.
- Madison, James : called parties "factions", 133, defines parties, 136.
- Matsyaganda : mother of Krishna Dvaipayana Vyasa, 68
- Maryland : a US State, 292.
- Mary : installation of, 69
- Marias v. General Officer Commanding* Privy Council decision in, 84.
- Marshall on equality and economic phenomena, 92.
- Marshall, Chief Justice : on delegation of powers, 176.
- Masterman Committee : on minor grades of civil servants, 425.
- Mansfield, Lord : restores liberty of an individual, 98, rules that the House of Commons is not a court of record, 463.
- Madhya Pradesh Part A State, 290; share of income-tax, 451.
- Madhya Bharat : Part B State, 290; share of income-tax, 451.
- Manipur : Part C State, 290.
- Mangena v. Edward Lloyd Ltd* : ruling in, 46.
- Madras : 219, Part A State, 290, Presidency of, 312; composition of State legislature, 428, share of income-tax, 451; port of, 488.
- High Court ruling on lack of jurisdiction in election matters, 473; permits vakils to practise on the original side, 489; civil and criminal jurisdiction of, 510; jurisdiction extended to Coorg, 512
- Mahomed Ail, Moulana : on Aga Khan Deputation, 221.
- Malenkov, M : report to Nineteenth Party Congress, 143.
- Marriott, John : on functions of Government, 164.
- Marbury v. Madison* 147.
- Massachusetts : a US State, 292.
- Maldah : district of, 394.
- May, Erskine : on private Bills, 438; on special procedure for grant of money, 440; on a point of parliamentary privilege, 461; on whether the House of Commons in a court of record, 462, 465
- Mayor's Court : a Court of record, 490

- MEDO 317.
- Melbourne Premiers' Conference in, 317.
- Mendel conception in genetics and how it is shaken, 105.
- Michurin : shakes old conception in genetics, 105.
- Middle Ages : social organization in, 130.
- MidWay : US territory, 292.
- Midnapur : obtained by Company, 218, district of, 394.
- Minor v. Happersett* : Chief Justice Waite's observation in, 42.
- Mir Jafar . 218.
- Mir Kasim: replaces Mir Jafar, 218.
- Mistri Dinshaw : case of, 464.
- Mohamed Ali, Prime Minister : explains US aid to Pakistan, 264; called upon to advise in forming Council of Ministers, 372; acquiesces in action of Governor-General, 373
- Montagu : retirement of, 360
- Montesquieu . disquisition of, 70
- Morgan conception in genetics and how it is shaken, 105.
- Morley, Lord on unsuitability of democracy to Indian society, 216-17; on difference between Hindus and Muslims, 221.
- Mountbatten : Wavell's successor, 234, man to stabilize situation, 235, accepts accession of Kashmir, 247.
- Moughals : cessation of legal sovereignty of, 217-8
- Murshidabad: district of, 394
- Mulvenna v. the Admiralty*: ruling in 405, 409
- Muslims : no seats reserved for, 470.
- Muslim League: a major Indian party, 134; programme of, 224, demand for Pakistan by, 226; rejects Cripps Scheme, 228-9, attitude to Wavell Plan, 231, policy regarding interim Government, 233; encouraged to hope for Pakistan, 234; accepts Attlee Government's plan, 238; rejects federal scheme of 1935 Act, 314.
- Mutual Defence Assistance Programme . 264.
- Mysore . a unit in itself, 247; Part B State, 289-90; composition of State legislature, 428; grant-in-aid to, 452, share in income-tax of, 454.
- Nationality Acts : part of English constitutional law, 35.
- Naturalization Act in India . 56.
- Naval Discipline Act : part of British military law, 83
- National Health Insurance Service 158.
- NATO : 317
- Nazimuddin, Prime Minister 371, —Cabinet : dismissed: 372
- Naga Tribal Area : special powers of Governor of Assam regarding, 376; representation in House of the people of, 430.
- Nadia district of, 394
- Nalinakhya Bysack v. Shyamsunder Halder* : Challenge to a constitutional amendment, 536.
- Nehru, Pandit : Prime Minister: legal status under Independence Act of, 44; on the position of Kashmir, 52, on mass contact, 223, interpretation of Gandhian principles, 225; Vice-President of the Executive Council, 233, declaration regarding Kashmir, 247; status as a British subject, 258, on elimination of the Queen's functions in regard to India, 259; President Eisenhower's letter to, 265, signs Technical Co-operation Agreement with America, 266-7; announces Commission for Re-organization of States, 302-3,

- on the non-permanence of any constitution, 543
- New Hampshire : a US State, 292.
- New York : a US State, 292.
- New Mexico : becomes a State of USA, 292.
- Nebraska : the only US State without a bi-cameral legislature, 477.
- Nichols : authority on right to private property. 103, 107-8
- NIRA Act, 1933 : certain provisions annulled, 486
- Niharendu Dutt-Majumdar v. the King-Emperor* : Federal Court judgement in, 96
- Nineteenth Party Congress : M. Malenkov's report to, 143
- North Carolina : a US State, 292.
- North-East Frontier Tract : special power of Governor of Assam regarding, 375, representation in House of the People of, 430
- Northern Ireland : given option to keep out of Ireland, 295.
- North-West Frontier Province : Muslim-majority Province: 222; plebiscite in, 236.
- N. P. Ponnuswami v the Returning officer, Namakkal Constituency, Salem District and four others*: Supreme Court decision in, 180.
- Oklahoma : becomes a State of USA, 292
- Ontario : Province of, 174
- Orissa : 219; ferro-manganese factory in, 268; Part A State, 290, grant-in-aid to 450, 452; share of income-tax 451.
- Pakistan : citizenship of migrants from, 53-4; law of citizenship in, 54, citizenship of migrants returning to, 55; naturalization not applicable to migrants from, 56; loose use of the term 'nationals' in, 60, British bureaucratic tradition in tact in, 114; prospect of parliamentary government in, 134-5; dominion of, 239; became member of international organizations, 241, 289, contention regarding Kashmir, 247; war with India not feasible, 255, leans to Commonwealth, 257, US military aid to, 264, Muslim bourgeoisie's hopes of, 285, difference from Ireland, 297-8, one-nation idea in, 340; 'no-nation' in, 341; British conventions in vogue in, 370; Governor-General of, 371.
- Government of: possible procedure in respect of rights of aliens, 81; fosters one-nation idea, 340.
- Citizenship Act: 57, provisions regarding Commonwealth citizen in, 63
- Parasara : father of Krishna-Dvaipayana Vyasa: 68.
- Paris: the Bastille in, 72.
- Commune, 73.
- Parliament : power regarding martial law, 82; powers regarding preventive detention, 178
- Patel, Sardar : interpretation of Gandhian principles, 225.
- Panama Canal Zone : US territory, 292.
- Patiala and East Panjab States Union: (PEPSU): Part B State, 290.
- Parlakemedi Case*: Privy Council decision in, 506
- Parliamentary Papers Act of 1940: on parliamentary privileges in. 461.
- Panama Refining Co v. Ryan* : 176
- Panikkar, Sardar K. M. : member, States Reorganization Commission, 302.
- Patna : Company Settlement at, 218
- High Court judgment on a civil servant's right to sue for

- salary upheld by Supreme Court, 411; a court of record, 490
- Petition of Right, the: part of English constitutional law, 35; how secured, 69, provisions of, 70.
- Petition of the Attorneys, the, 1875: in Madras 489.
- Pennsylvania : a US State, 292.
- Pendleton Act of 1883: of US . 419
- Phillipine Islands US territory granted independence, 292.
- Plato: on "Good Life", 12.
- Poindexter v. Greenhow* . US Supreme Court's observations in, 26
- Police Act, the : certain provisions of, 400-2.
- Portugal cedes Bombay to English King: 217.
- Popular Front Government of Spain: destroyed, 271.
- Ponnuswami v the Returning Officer Namakkal Constituency, Salem* . ruling in, 473.
- Proclamation of Emergency : provision for, 112-4, 334, effect on duration of the House of the People, 430; and other Proclamations, 454-5.
- Proclamation in 1858 : 206
- Proclamation of India as a Republic: 250; whether it eliminates Queen's sovereignty, 255.
- Presidency Division of West Bengal, 294
- President of the USA : head of the Executive, 362.
- President of India . head of the Executive, 344.
- Premiers' Conference in Australia, 315.
- Privy Council . functions of, 355-6. —Judicial Committee of: on justiciability of acts of the military in a war area, 84, on freedom of speech and expression, 96, amendment to Indian Constitution restores rule of, 98; on validity of Indian Act of 1869, 173; decisions on parallel measures, 174; ruling on a civil servant's claim of pay, 406-8, appeals from High Courts to, 491, decision regarding pre-Constitution powers of High Courts to issue writs, 506; reference jurisdiction, 508-9. —Channel Islands Committee, 356.
- "Proceedings against Gottschalk and his comrades", by Marx, 486
- Punjab 219; Muslim-majority province, 222, 231; on plebiscite in, 236; Part A State, 290; composition of State legislature, 428; share of income tax, 451; grant-in-aid to, 452.
- Public Authorities Protection Act : advantage to public servants: 160.
- Public Service Commissions : composition and powers of, 415-7
- Puranas*, the . incorporate freedom for the individual. 69, 190-2
- Puerto Rico : US territory, 292 representation of, 293.
- Queen of the United Kingdom : head of the Executive, 167; elimination from Indian laws of reference to, 250; India has yet to cut off connection with, 287.
- Queen v. Burah* : Privy Council decision in, 173.
- Queen Anne, 442.
- Queen's Bench Division . competence of, 55; how exercised, 156; ruling on parliamentary privileges, 460-1, has appellate power, 520.
- Quebec : resolutions of 1864, 315.
- Rajendra Prasad, Dr. . Government of, 32.
- Ramayana* . 190; pattern of values in, 216.

- Ram Rajya : 190.
- Ranjulal v. Income-tax Officer, Mahindar Garh*, 87
- Rajagopalachariar, Sri : interpretation of Gandhian principles, 225; distinct line adopted by, 229; decries linguistic provinces, 303.
- Rajasthan . Part B State, 290
- Ramesh Thapher v. the State of Madras* : decision on judicial remedy as a fundamental right, 110.
- Re Clifford and O'Sullivan* : House of Lords ruling in, 84.
- Regulating Act of 1773; sets up King's Court, 488.
- Red Army march on Berlin, 230.
- Representation of the People Act, 1951: follows pattern, 179-80.
- Reformation, the British change wrought by, 130.
- Renaissance, the change wrought by, 130.
- Republic—of Plato, 12.
- Republic of Ireland Act, 1948: completely eliminates Crown, 262.
- Republicans, American: 24; replace Democrats, 31, emergence of, 133; Class character of, 136.
- Reforms Act, the: part of English constitutional law, 35
- Revolution of 1688, the: 130, results of, 161
- Revolution of 1917 : class antagonism in the USSR eliminated by, 142.
- Rhode Island: a US State, 292
- Rome : class division in, 12, patricians and plebeians in, 43, character of social organization in, 130.
- Rousseau on the state of nature, 7.
- Roosevelt: "deals", 340.
- Robson, Dr.: contradicts Dicey and Hewart, 150; on administrative justice, 181; on the hegemony of the executive, 188.
- Royal Warrant of Procedure : reference to office of Prime Minister in: 360.
- Runnymede : Magna Carta secured at, 69.
- Russia : armed revolt in, 45.
- Russian Revolution of 1917 : change in character of, 29.
- Russell v. the Queen* : Privy Council decision in, 174.
- Saha Dr. M.N. : a citizen of India, 53.
- Salmond : *Jurisprudence*: on "legal right", 499
- Salisbury, Lord: last Prime Minister from the House of Lords, 359; his Government not affected by Lord Randolph Churchill's retirement, 360.
- Samuel, H.: resignation from MacDonald Government, 360.
- Sarker, N. R.: member of Linlithgow Government, 229.
- Salaries Act, 1937: reference to office of Prime Minister, 360.
- Saurashtra: Part B State, 290; share of income-tax, 451
- Salvation Army, the: 198.
- Schter Poultry Corporation v. the United States*, 176, 486.
- Second World War: change in China after, 29; Russia was ally of the democracies in, 126, development following break-out of, 226; Indian big business consolidated during, 285
- Security Council of UN: China's representation in, 29; dispute regarding Kashmir before, 52.
- Seidel: view on sovereignty, 282.
- Sepoy Rebellion: 266.
- Shanti Parba*. of *Mahabharata*, 5.
- Sherman Anti-Trust Act: begins federal centralization in USA, 183.
- Shays, Captain of Revolutionary Army. Comment on Declaration of Independence, 71.

- Shankari Prasad v. the Union of India* decision in, 533.
- Sind. separated from Bombay : 220, on plebiscite in, 236.
- Siraj-ud-doula: defeat of, 218.
- Sinclair. resignation from MacDonald Government, 360.
- Sinha, Lord. legal status regularised, 64-5; a British subject, 258
- Snowden resignation from MacDonald Government, 360.
- Socialist British on the western democratic approach, 24.
- South Africa. division of whites and non-whites in, 43; a Commonwealth country, 62; a multinational State 129, a unitary State, 305-6; Provisions for official languages in, 337-8.
- South Africans: not fully aliens, 61.
- South Carolina : a US State, 292
- Soviet Union or USSR : see USSR.
- Soviet of the Union, 320; one of the two chambers of the Supreme Soviet, 351: Composition of, 429; possible disagreement with the Soviet of Nationalities, 478
- Soviet of Nationalities : equal power with the Soviet of the Union, 320: one of the two Chambers of the Supreme Soviet, 351; composition of, 429, allocation of seats in, 472.
- Southern Ireland or Eire : relation with the King, 252-4.
- Stalin, Joseph: refers to USSR Constitution 35, 318-9; on the character of the proletarians, 36; on the character of the Soviet State, 38-9; on the withering away of the State, 40-1; on the nature of commodity production in the USSR, 137; speech opposing abolition of Soviet of Nationalities, 478.
- Star Chamber Abolition Act of 1640 : contributes to fundamental rights, 70.
- State of Bihar v. Kameswar Singh*: a Supreme Court judge's observations in, 79-80
- State of Bombay v. Balsara*, 87.
- State of West Bengal v. A. A. Sarker*, 87, 89.
- State of Bihar v. Maharajadhiraja Sir Kameswar Singh of Darbhanga*, 105.
- State of Seraikella and other States v. the Union of India and another*, 298
- State of Travancore-Cochin and others v. the Bombay Company Ltd. Allepey*: ruling in, 457
- State of Travancore-Cochin and others v. the Shanmugha Vilas Cashewnut Factory, Quilon and others*: ruling in, 458
- Statute of Westminster, 1931 : Indian Independence Act compared with, 241-4; preamble to, 259.
- States Merger (Governor's Province) Order . 246.
- States, Union of : formation of, 247.
- Stephen : on the right of the House of Commons, 465.
- Stoutenburgh v. Henrick* : decision in, 176.
- Street: defines illegality: 514-5.
- Sudder Court : under East India Company 488.
- Suleman v Secretary of State in Council*, 251
- Sutanati : Company obtains rights over, 218
- Sunil Kumar Bose v. the Chief Secretary to the Government of West Bengal*. Calcutta High Court decision in, 376.
- Supreme Court under East India Company jurisdiction of, 488; succeeded by High Courts, 489.

- Supreme Court: individual's right of access to, 86; decisions on interpretations of constitutional clauses, 87; lacunae in interpretations of "equality before the law" by, 87-92; interpretation of freedom of speech and expression, 95-8; interpretation of liberty of person and preventive detention, 99-102; interpretation of right to private property, 102, 105; interpretation of judicial remedy as a fundamental right, 110-12; description of the State, 124; reference by the President to, 171-2, on delegation of powers, 174-6; on preventive detention, 179; on civil servant's claim to salary, 411-3; difference with Privy Council exined, 413-4; defines industrial disputes, 426-7; ruling on import-export clause, 457-9; on lack of jurisdiction in electoral matters, 473-74; rules that Supreme Court advocates can practise in High Courts, 490, is a court of record, 492, powers and terms of service of judges of, 494; jurisdiction of, 497-505, reference jurisdiction of, 508-9; has on power of judicial review, 541.
- Switzerland women have no right to vote in, 127; a multinational State, 129, a federal union, 310-1; centralization of State in, 318; provisions regarding official languages, 337; President of, 354; Judicial dyarchy in, 519.
- Swiss Confederation, the: President elected through electoral college, 350.
- Swiss Constitution, the: guarantees sovereignty to territories, 300; origin of, 311, legal provisions of 518
- Swiss Federal Tribunal, the: jurisdiction of judges of, 517-8
- Swiss Federal Assembly, the: 517.
- Sylhet referendum in, 237.
- Territorial Army Act of 1948. part of military law, 83.
- Thornhill v Alabama*: USA Supreme Court observation in, 95.
- Tilak's Case : decision on freedom of speech and expression, 96.
- Tocqueville : view on sovereignty, 282.
- Tories: old English party, 131; based on landed interest, 132.
- Travancore-Cochin : Part B State, 290; Share of income-tax, 451; grant-in-aid to, 452.
- Treatise on the Doctrine of Ultra Vires* : by Street, 514.
- Tribunal des Conflicts*: French conflict-court, 154.
- Twenty-four Parganas or 24 Parganas. district of, 394; assigned to Clive, 218.
- Twelve Tables—of Rome: incorporate freedom of the individual, 69
- Ulster or Northern Ireland: given option not to join Southern Ireland, 295.
- United provinces. raised to the status of a Governor's province, 219; renamed Uttar Pradesh, 290. —*v the Governor-General in Council*, 498-500.
- United Nations or UN. relations with member-states, 212-3, regional arrangements within, 217. —Security Council: Chinese representation in, 29.
- United Kingdom : change of Government in, 31; requisites of citizenship in, 49; dual nationality in, 51; a Commonwealth country, 62; not a foreign country in relation to India, 63, 65; rights of Irish citizens in, 64; provision for making rules or orders in, 170.

USA or United States of America: nature of property in, 21; does not recognize People's China, 29-30; federal unity of, 34; whites and negroes in, 43; requisites of citizenship in, 47; dual citizenship in, 49, dual nationality in, 51; State citizenship in, 52; citizenship by naturalization in, 56; amendments to constitution of, 75; question of martial law in, 85, adopts *Eminent Domain*, 105; judicial proceedings provided not in constitution but by statutes, 115; women's right to vote recently conceded in, 127; eligibility for membership of the legislature in, 128; parties in, 133, party government in, 134; President's role in legislation, in, 163; administrative law in, 176; pattern of administrative justice in, 182; supports Pakistan over Kashmir, 247; refuses recognition to New China, 270; recognized Israel and Franco regime of Spain, 271; sovereignty in, 280-83; incorporation of States in, 292; a federal State, 306; development of State of, 309-10; centralization of State in, 318, election of President and Vice-President of, 352-4; Presidential system in action, 361-6, Civil Service Commission, 419; 'screening' of public servants, 422, law-making authority in, 428-9; the jury system in, 526; procedure for constitutional amendment in, 538.

—Mutual : Defence Assistance Pact, 264,

—Senate: 365; composition of, 429; gained influence, 477 —

—House of Representatives 365, composition of, 429

—Congress: to decide naturalization of persons, 57; Declaration of Independence by, 71; impelled by events in France, 72; passes fourteenth amendment to constitution, 75; passes fifteenth amendment, 76, precluded from limiting freedom of speech and expression, 94; certain powers of, 166; power to declare war, 281; functioning of, 364-6; privileges of members, 466-7.

—Supreme Court. on distinction between the State and the Government, 26; construction put on constitutional provisions by, 76; observations on freedom of discussion, 95; has right of judicial review, 100; intervenes only on appeal, 115, asserts supremacy of natural Justice, 145-7; on States' jurisdiction in foreign affairs, 280; on division of sovereignty between the Centre and the States, 281; strengthened the Centre by judicial review, 283; role and limitations of, 481-6; concern over property rights, 486, on reference jurisdiction, 509; appellate jurisdiction of, 516-7; procedure for judicial review, 540-41

United States v. Curtis-Wright Export Corporation: 280.

Union of Soviet Socialist Republics or USSR or the Soviet Union. a departure from the familiar laws of marriage 18; peoples' dictatorship in, 20, nature of property in, 21, questions about, 35; character of State of, 36; change in class character of, 38; definition of citizenship in, 47-8; dual citizenship in, 49; State citizenship in, 52; citizens are aliens in India, 61; position regarding

private property and class antagonism in, 116-7; antagonism between State and individual non-existent in, 119-20; fundamental rights are not a mere programme but a record of achievements in, 121, distinction from the "democratic" way, 122-5; branded as a totalitarian State, 126; view refuted, 127-9; basis of one-party system of, 136-142; democracy exists in, 143-4, position of judiciary in, 187; all-embracing nature of State of, 196-7; right to work given in, 207; work a duty in, 210; gains prestige in War, 230; sovereignty in, 280; laws interpreted by Supreme Soviet, 282; nature of State of, 307; whether a federation, 318-324; a Socialist State, 325; provisions regarding official languages, 337; analogy regarding method of election of President, with: 350-1; law making authority in, 429; working of the judicial system of, 521-4; procedure for constitutional amendment in, 539; procedure for interpretation of laws and judicial review different in, 541; interpretation and review left to the Presidium, 542-3.

—Supreme Soviet of: laws interpreted by, 282; highest authority, 351-2; commissions of, 441-2; privileges of members of, 467-8.

—Council of Ministers of, 351.

—the Government of, 351.

—the President of, 354.

—Constitution of 1926, 543.

—Constitution of 1936

Stalin's reference to 35, 215; provisions regarding readjustment of States, 301; provisions regard-

ing allocation of functions, 322-4; amendments to draft of, 478; consequences on laws of USSR; 543.

—All-Union Peoples' Commissariats, 323.

—Union-Republic Peoples' Commissariats 323.

—Union Republics: equal representation of, 472; may demand convening of Supreme Soviet, 479.

Uttar Pradesh . Part A State, 290; composition of State legislature, 428; share of income-tax, 451.

Valmiki : story of, 68.

Vedas : 190-2

Victoria, Queen . assumes Government of India, 206; legal authority of, 269.

Vishnu Purana : on the change of States, 28

Virgin Islands : naturalization in USA of inhabitants of, 57, US territory, 292.

Virginia: a US State, 292.

Virginian Declaration of Rights of 1776: draft of fundamental rights' '70-1

Von Ihering on the basis of law, 16.

Vyshinsky : on the basis of law, 16; on the character of the Soviet State, 36; on the bourgeois Court, 526.

Wade and Phillips. on functions of Parliament, 358.

Wahl v. A. G issues considered by House of Lords in, 59.

Waite, Chief Justice on citizenship, 42.

Walker v Baird: decision in, 160.

Wavell, Viceroy: Plan of 230-1, on interim Government, 233.

Wayman v. Southard: decision in, 176.

Washington: not within a State, 294.

- Weimar Constitution of Germany: 78.
- Weitz: view on sovereignty, 282.
- West Dinajpur: district of, 394.
- West Bengal: Part A State, 290; two divisions of, 394; controversy regarding Public Service Commission, 417; composition of State legislature, 428; grant-in-aid to, 450, 452; share of income-tax, 451.
- West Bengal Premises Rent Control Act, 1948: Supreme Court reference to, 536.
- Weisman: Conception in genetics and how it is shaken, 105
- West Punjab: 239.
- White v. Tennant*, 58.
- Wheare, Professor: on nature of State, 308-9, 316; on the State of USSR view criticized, 320-1.
- Whigs: old English party, 131; based on theory of competition, 132.
- William: installation of, 69
- Willoughby: on the inalienable right of private property, 106; authority on private property, 107; on separation of powers in America, 165.
- Wills: authority on right to private property, 107.
- Wilson, Woodrow: President of USA, 353.
- Wong Kim Ark*. case of, 50.
- Workmen's Compensation Act, 1925: 520.
- Yudhisthira: query to Bhishma, 5; Bhishma's discourse to, 194.
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